TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 725

FAIRMONT CREAMERY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA

FILED NOVEMBER 8, 1926

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INDEX

DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 10, 1926

[fol. 1]

IN DISTRICT COURT OF COTTONWOOD COUNTY, THIRTEENTH JUDICIAL DISTRICT, STATE OF MINNESOTA

STATE OF MINNESOTA, Plaintiff,

vs.

FAIRMONT CREAMERY COMPANY, Defendant

Criminal. No. 5963

Before Honorable L. S. Nelson

Appearances of counsel omitted in printing.

[fol. 2] IN JUSTICE COURT OF COTTONWOOD COUNTY

STATE OF MINNESOTA, Plaintiff,

vs.

FAIRMONT CREAMERY COMPANY, Defendant

Before L. C. Churchill, Justice of the Peace

COMPLAINT

L. R. Ranke, of the City of St. Paul, Minnesota, being first duly sworn, and examined on oath, complains in writing and says that at the Village of Bingham Lake, in the County of Cottonwood and State of Minnesota, on the 11th day of June, 1923, the Fairmont Creamery Company did commit the crime of unfair discrimination in the purchase of butter fat for manufacture and sale, committed as follows:

That said Fairmont Creamery Company, being then and there and now a corporation duly organized and existing under the laws of the State of Minnesota and being then and there engaged in the business of buying milk, cream

and butterfat for manufacture and sale, and then and there having and maintaining regularly established stations for the purchase of milk, cream and butterfat, for manufacture and sale, at the villages of Madelia, Mountain Lake, and Bingham Lake, all in the State of Minnesota, and at divers and various other villages and localities in said State, the [fol. 3] said villages of Madelia, Mountain Lake, and Bingham Lake, each constituting and being a separate and distinct locality and community, the said milk, cream and butterfat so purchased at said stations to be shipped, and was shipped, by it to the City of Sioux City, State of Iowa, for manufacture and sale thereat, did wrongfully, unlawfully and unfairly discriminate between said localities by then and there paying a higher price for butter fat at some of its said stations than at other of its stations, after making due allowance for the difference in the actual cost of transporting the said butterfat from the said stations where purchased to said City of Sioux City, Iowa, more particularly as follows:

That on the said 11th day of June, 1923, the said Fairmont Creamery Company did then and there purchase butterfat in the form of cream at the said Village of Madelia and pay therefor as the price thereof the sum of thirty-eight cents per pound for said butterfat, and did on the same day at said villages of Mountain Lake and Bingham Lake purchase at each of said stations butterfat in the form of cream and pay therefor as the price thereof the sum of thirty-five cents per pound for said butterfat. That the actual cost of transporting said butterfat in the form of cream from said respective points of purchase to said City of Sioux City, State of Iowa, was proportionate to and measured by the charge made by the charge made by common carriers of cream in cans from said respective points of purchase to said City of Sioux City, State of Iowa; that the fixed and established charge by common carriers from said Villages [fol. 4] of Madelia, Mountain Lake and Bingham Lake to the said City of Sioux City, of butterfat in form of cream in cans of respective capacity of five gallons, and ten gallons, on said 11th day of June, was as follows, to wit:

Place of shipment	5 gal. cans	8 gal. cans	10 gal. cans
Madelia	36 cents	47 cents	50 cents
Mountain Lake	36 cents	44 cents	49 cents
Bingham Lake	32 cents	43 cents	48 cents

that all of said cream so purchased at said Villages of Madelia, Mountain Lake and Bingham Lake were of the same average percentage of butterfat and was purchased for shipment and was shipped to Sioux City, Iowa, for manufacture and sale thereat; all contrary to the statute in such case made and provided and against the peace and dignity of the State of Minnesota.

Dated at Windom, Minnesota this 22nd day of December, 1923.

L. R. Runke.

Subscribed and sworn to before me this 22nd day of December, 1923. L. C. Churchill, Justice of the Peace.

[fol. 5] Summons in usual form omitted in printing.

In Justice Court of Cottonwood County

Judgment—January 19, 1924

After considering all the evidence offered, it is the judgment of this Court that the defendant, Fairmont Creamery Company, is guilty of the offense charged in the complaint and warrant of arrest and it is further

Ordered that as punishment therefor, the said defendant, Fairmont Creamery Company pay a fine of $25.00, together with the costs of this action, taxed by me at $15.35, in all amounting to $40.35.

[fol. 6]

L. C. Churchill, J. P.

In Justice Court of Cottonwood County

Notice of Appeal

To O. J. Finstad, County Attorney:

You will please take notice, that the defendant in the above entitled action appeals to the District Court of Cottonwood County, Minnesota, from that certain order made by the Justice of the Peace in said cause, wherein he found the defendant guilty of the crime set forth in the complaint and imposed a fine on the said defendant of $25.00 and costs, and that said appeal is taken on questions of law and fact.

Charles A. Flinn, Attorney for Defendant, Windom, Minn.

Dated Jan. 28, 1924.

Minute Entries

Bond in due form made and filed with the Justice of the Peace.

Appeal allowed.

Return of Justice to District Court.

In District Court of Cottonwood County

Statement of Evidence

The cause being reached on the calendar came on to be tried before the Hon. L. S. Nelson, when the following proceedings took place:

Mr. Flansburg: If Your Honor please, we object to the jurisdiction of the Court over the person of the Defendant and the subject matter of the action, for the reason [fol. 7] that the information alleges the offense to have taken place in Madelia, in Watonwan County and not in the County of Cottonwood.

The Court: Motion denied.

Mr. Flansburg: I want to file a motion to quash the proceeding.

Whereupon the following motion was made by the defendant:

MOTION TO QUASH

Comes now the Fairmont Creamery Company, defendant in the above entitled matter, and moves that the information filed in the above cause be quashed for the following reasons:

I

That the statute of Minnesota known as Chapter 120, of the Session Laws of 1923, upon which said information is based, is unconstitutional and void, for the reason that it is in violation of the Constitution of the State of Minnesota, which provides that no person shall be deprived of life, liberty or property without due process of law.

II

For the reason that said section of the statute is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law.

III

For the reason that said statute is unconstitutional and void for the reason that it violates that provision of the United States Constitution in the Fourteenth Amendment [fol. 8] thereof, providing that no State shall deny to any person within its jurisdiction the equal protection of the laws.

IV

For the reason that there is no law in the State of Minnesota which makes unlawful the acts charged in said information and complaint.

V

For the reason that the said statute is unconstitutional and void since it places an unreasonable burden upon and interference with Interstate Commerce.

VI

For the reason that the said statute is unconstitutional and void as in violation of the commerce clause of the Constitution of the United States, Art. 1, Section 8, Clause 3, providing that Congress shall have the power to regulate commerce between the States.

VII

For the reason that the said statute is in conflict with the Statutes of the United States regulating and governing interstate commerce between the States.

VIII

For the reason that the facts set forth in the information and complaint are insufficient under the laws of the State of Minnesota to constitute an offence.

The following additional motion was also made by Mr. Flansburg:

We move that the action be dismissed for the reason that Section One of Chapter 120 of the laws of 1923 is unconstitutional.

[fol. 9] Chapter 120—Section One reads as follows:

"Any person, firm or co-partnership or corporation engaged in the business of buying milk, cream or butterfat, for manufacture or for sale of such milk, cream or butterfat, who shall discriminate between different sections, localities, communities or cities of this State, by purchasing said commodities at a higher price or rate in one locality than is paid for the said commodities by said person, firm, co-partnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of sale of such milk, cream, or butterfat, shall be deemed guilty of unfair discrimination and upon conviction thereof, shall be punished by fine not exceeding one hundred dollars ($100.00), or by imprisonment in the County Jail for not exceeding ninety (90) days."

By the Court: After hearing the argument of the Counsel, the motions are denied and the law held constitutional.

The Court: The defendant was required to plead and pleaded that it is not guilty.

The Court: The defendant consented to waive a jury and try the cause to the court.

Mr. Flansburg: In order to shorten the record, Your Honor, there have been one or two things that have been agreed upon.

STIPULATION AS TO FACTS

It is stipulated between the parties to this action that the Fairmont Creamery Company is a corporation duly organized and existing under the laws of the state of Minnesota, and on the fifteenth day of June, 1923, was engaged [fol. 10] in the business of buying milk, cream and butterfat for manufacture and sale, and it was then and there having and maintaining regularly established stations for the purchase of milk, cream and butterfat, for manufacture and sale, at the villages of Madelia, Mountain Lake and Bingham Lake, all in the state of Minnesota, and at various other points in the state, and that they were buying cream and butterfat at these stations, to be shipped to the city of Sioux City, in the state of Iowa, for manufacture and sale at that point, and there is a schedule of rates, express rates, for the shipment of cream in cans in the complaint here. That was admitted the last time; that the actual cost of transporting of said cream, from the respective points of purchase, to the city of Sioux City, state of Iowa, from the villages of Madelia, Mountain Lake and Bingham Lake, in the state of Minnesota, on the eleventh day of June, 1923, was as follows:

Five gallon cans—

Madelia	36 cents
Mountain Lake	36 cents
Bingham Lake	32 cents

Eight gallon cans—

Madelia	47 cents
Mountain Lake	44 cents
Bingham Lake	43 cents

Ten gallon cans—

Madelia	50 cents
Mountain Lake	49 cents
Bingham Lake	48 cents

[fol. 11] Mr. Flansburg: And the said transportation charge includes the cost of transportation of the can to the place of manufacture and sale, and the return of the can to the point of shipment.

Mr. Finstad: We will call Mr. Lohnbakken.

L. Lohnbakken, a witness introduced on the part of the State, being duly sworn, gave the following testimony:

Examined by Mr. Finstad:

Q. Your name is?
A. L. Lohnbakken.
Q. Your first name is?
A. Louie.
Q. Where is your home, Mr. Lohnbakken?
A. St. Cloud.
Q. What is your business?
A. Creamery inspector.
Q. You are employed by the State Dairy and Food Department of the state of Minnesota?
A. Yes, sir.
Q. How long have you been in their employ?
A. Three years and two months.
Q. Were you employed by them during the month of June, 1923?
A. Yes, sir.
Q. And what were your duties?
A. Our duties were to inspect creameries and check up cream stations—on sanitation, checking up the prices and along that line.
Q. Was it a part of your duty to ascertain whether the centralized creameries were obeying the law with reference to discrimination at various points in the state of Minnesota?
[fol. 12] A. Yes, sir.

Q. And on the eleventh day of June, 1923, did you visit the cream stations at Bingham Lake, Mountain Lake and Madelia?

A. I did.

Q. And Bingham Lake and Mountain Lake are located in the county of Cottonwood, in the state of Minnesota, are they not?

A. Yes sir.

Q. Where is the village of Madelia located? In what county?

A. Watonwan.

Q. In the state of Minnesota?

A. Yes, sir.

Q. And did you do anything for the purpose of ascertaining whether or not the cream buyers for the firms operating cream stations at those places were conforming to the law, with reference to discrimination in the matter of buying cream?

A. Yes, sir, we did.

Q. Did you find any cream stations at Bingham Lake and Mountain Lake?

A. Yes, sir.

Q. What cream stations were there at those points?

A. They were the Fairmont Creamery Company's.

Q. At both of those points?

A. Yes, sir.

Q. Did the Fairmont Creamery, this defendant, also have a cream station at Madelia, in the county of Watonwan?

A. Yes, sir.

Q. And were there other cream stations at those places [fol. 13] besides the stations of the Fairmont Creamery Company?

A. Yes, sir.

Q. How many stations did they have at Bingham Lake?

A. The Fairmont Creamery Company, do you mean?

Q. Yes.

A. They had one.

Q. And one at Mountain Lake?

A. Yes, sir.

Q. And one at Madelia?

A. Yes, sir.

Q. Were there other cream stations at these places?

A. Yes, sir.

Q. I mean other cream stations at Bingham Lake?

A. You mean just these besides the Fairmont, do you mean?

Q. Yes. How many other cream stations at Bingham Lake?

A. I could not say.

Q. Was there one or more?

A. There was one at Bingham Lake that I know of.

Q. And at Mountain Lake?

A. Well, there is another one at Mountain Lake, but I could not say how many.

Q. Was there a creamery at Mountain Lake?

A. Yes, sir.

Q. Engaged in buying cream from the farmers?

A. Yes, sir.

[fol. 14] Q. And dairy products?

A. Yes, sir.

Q. And at Madelia, were there any cream stations and creameries there?

A. Yes, sir. There are two creameries and two cream stations, I think.

Q. What kind of cremeries were those creameries at Madelia?

A. One is an individual and the other is co-operative.

Q. Farmers incorporated the creamery?

A. Yes, sir.

Q. Did you sell any cream at these stations?

A. I did.

Q. On the eleventh day of June, 1923?

A. Yes, sir.

Q. And where did you first sell cream?

A. At Madelia.

Q. And where did you sell it?

A. To the Fairmont Creamery Company.

Q. And tell just what you did with reference to the sale of cream at the Fairmont Creamery Company's station at Madelia, on that date?

A. We took a can of cream over to the agent and he bought it, issued a check for it and that was all there was to it.

Q. There was an agent in charge of the Fairmont Creamery's place at Madelia that you dealt with?

A. Yes, sir.

Q. Do you remember what his name was?

A. No, I don't. I know the agent, but he had a substitute there at that time.

Paper marked State's Exhibit A by the Court Reporter for Identification.

[fol. 15] Q. I show you State's Exhibit A, and will ask you to state what that is?

A. This is the check that I received at Madelia.

Q. For the cream that you sold there that day?

A. Yes, sir.

Mr. Finstad: We offer State's Exhibit A in evidence.

Mr. Finstad hands the Check to Mr. Flansburg for his inspection.

Mr. Flansburg: No objection.

The Court: It may be received.

Q. Did you assist——

Question withdrawn.

Q. Did you test the cream, or see the cream tested there at Madelia?

A. I did.

Q. What was the test of this cream at Madelia?

A. Why, I cannot remember exactly what it was.

Q. Have you had practice in your work in testing cream so that you know the amount of butterfat in cream by test?

A. I do.

Q. And the price indicated here on the margin of the check —thirty-eight cents, is that the price that you were paid that day at Madelia for this cream that you delivered?

A. Yes, sir.

Q. Did you deliver the cream and leave it there at the station when you received this check?

A. I did.

Q. And the manager of the station at Madelia, was his [fol. 16] name H. P. Strong, whose name appears——

A. That is the man who runs it, but he had a substitute by the name of Koovey, I think his name is.

Q. And you received your check from Strong or from the other man?

A. From the other man.

Q. Then where next did you take cream?

A. To Mountain Lake.

Q. And did you sell cream there at the Fairmont Creamery Company's station at Mountain Lake on the same day?

A. Yes, sir.

Q. And do you remember who was in charge of the Fairmont Creamery Company's station at Mountain Lake on that day?

A. I could not remember his name.

Q. Did you receive a check for cream that you sold at the station of the Fairmont Creamery Company at Mountain Lake?

A. Yes, sir.

Paper marked State's Exhibit B by the Court Reporter for Identification.

Q. I show you State's Exhibit B, and I will ask you what that is?

A. It is the check that I received at Mountain Lake from its man there.

Q. From the Fairmont Creamery Company's station at Mountain Lake, for the cream that you sold there that day?

A. Yes, sir.

Q. And by referring to the check, can you tell how much cream you sold there that day?

A. Yes, sir; I can do that.

[fol. 17] Q. How much?

A. I sold—lets see—twenty-two pounds.

Q. And can you tell who the agent was at Mountain Lake of the Fairmont Creamery Company?

A. Well, his name was Kline, or something like that.

Q. H. G. Kline?

(No response)

Q. This State's Exhibit B is the check that you received for the cream that you delivered that day?

A. It is.

Q. And did you test the cream that you sold there at Mountain Lake that day?

A. Yes, sir.

Q. What was the percentage of butterfat in the cream that you sold at Mountain Lake?

A. Fifteen per cent.

Q. The sale is indicated on the stub of this check?

A. Yes, sir.

Mr. Finstad: We offer State's Exhibit B in evidence.

Q. How much did you receive for this cream?

A. Well, I could not memorize that unless I took a look at it and see what it is—$1.15.

Witness looks at paper.

Mr. Flansburg: No objection.

The Court: It may be received.

Q. And the price indicated on the margin of this check—thirty-five cents, is that the price per pound of butterfat that you received at Mountain Lake on that day?

[fol. 18] A. Absolutely.

Q. And did you, on the same day, take any cream to the station of the Fairmont Creamery at Bingham Lake, in this state?

A. Yes, sir.

Q. And did you sell any cream at the station of this defendant company at Bingham Lake, on that day?

A. I did.

Q. And did you receive a check for it?

A. Yes, sir.

Check marked State's Exhibit C by the Court Reporter for Identification.

Q. I show you State's Exhibit C, and I will ask you what that is?

Mr. Finstad hands the exhibit to the witness for his inspection.

A. That is the check that I received at Bingham Lake.

Q. And can you tell what was the name of the agent of the company at Bingham Lake?

A. Shott was it—but I cannot be sure until I put my glasses on. I cannot tell.

Q. And what price did you receive per pound of butter fat for the cream you delivered at Bingham Lake?

A. Thirty-five cents.

Q. And did you test the cream that you delivered at Bingham Lake?

A. Yes.

Q. And what percentage of butter fat was there in the cream that you delivered at Bingham Lake?

A. Fourteen.

Q. Fourteen per cent?

[fol. 19] A. Yes, sir.

—. ——.

A. Thirty-five cents.

Q. And how many pounds did you deliver?

A. Twenty-seven pounds.

Q. And this check, State's Exhibit C, you received from the agent there at Bingham Lake, of the Fairmont Creamery Company, in payment of the cream that you delivered there that day?

A. Yes, sir.

Mr. Finstad: We offer State's Exhibit C in evidence.

Mr. Finstad hands State's Exhibit C to Mr. Flansburg for his inspection.

Mr. Flansburg: There is no objection.

The Court: It may be received.

Q. Was there any creamery at Bingham Lake?

A. Yes, sir—Bingham Lake, did you say?

Q. Yes?

A. No, there is no creamery at Bingham Lake; it was Mountain Lake that I had reference to.

Q. And you knew how the railroads run through these towns for Sioux City?

A. Yes, sir.

Q. Which point of these three towns is fartherest away from Sioux City?

A. Madelia.

Q. And on what railroad are all of these towns?

A. On the Omaha.

Q. And do you know whether cream was shipped over the Omaha road from these points to Sioux City?

[fol. 20] A. I could not swear to that, but that is the only way that they can go.

Q. And the town next is Mountain Lake or Bingham Lake—which town is nearest to Madelia, on the Omaha Road?

A. Mountain Lake.

Q. Is there any railroad in Bingham Lake or Mountain Lake than the Omaha Road?

A. No.

Q. And how is cream commonly shipped?

A. Shipped in five, eight or ten gallon containers—cans.

Q. And the butter fat is shipped right in the cream as it is purchased from the farmers, Mr. Lohnbakken?

A. Yes, sir.

Q. To the centralized plant at Sioux City, in this case?

A. Yes, sir.

Q. And how is cream commonly purchased at these cream stations—by the quantity of cream, the bulk of the cream, or by the percentage of butter fat contained in the cream?

A. By the percentage of butter fat.

Q. Is that the basis of the price which is paid?

A. Well, I don't quite understand your question.

Q. The percentage of butter fat in the cream, is the basis of the payment?

A. Yes; certainly.

Q. And these sales that you made were made on the basis of the percentage of butter fat contained in the cream?

A. Yes, sir.

[fol. 21] Mr. Finstad: That is all. You may take the witness for cross examination.

Cross-examination: By Mr. Flansburg.

Q. You say this was on June eleventh, 1923, Mr. Lohnbakken?

A. Yes, sir.

Q. Do you remember how you were traveling that day? Was it by automobile?

A. Yes, sir.

Q. Do you remember were you left in the morning when you started out on this trip?

A. Absolutely.

Q. Where were you?
A. We left from St. James.
Q. What was the first town that you——
A. Madelia.
Q. You arrived at Madelia first?
A. Yes, sir.
Q. What was the price that all the other dealers were paying at Madelia on that day?
A. I did not check up on the one station there—that was the Fairmont and they paid thirty-eight cents.
Q. You do not know what the other stations were paying?
A. Not in Madelia.
Q. Do you know what they were paying down at Mountain Lake and Bingham Lake?
A. Yes, sir.
Q. What were they paying there?
A. Thirty-five, I understood.
Q. Thirty-five, you understood?
A. Yes, sir.
Q. At both of these places?
[fol. 22] A. Yes, sir.
Q. The Fairmont Creamery Company was paying the same rate that the other dealers were paying for butter fat on that day?
A. I could not say?
Q. At those stations?
A. I know the Fairmont was paying thirty-five cents.
Q. Do you know what the other stations were paying?
A. I did not check up any of those.
Q. Do you know how it was that this cream that you sold at Bingham Lake and Mountain Lake tested only fifteen per cent?
A. No.
Q. What did you put in this cream?
A. We took this cream the way we got it.
Q. Where did you get that cream?
A. At St. James.
Q. It was all one can?
A. No.
Q. Well you say it tested thirty-two per cent in Madelia how did that test fifteen per cent at Mountain Lake then?

A. I suppose it was from different batches of cream.

Q. As a matter of fact, didn't you doctor up this milk with some buttermilk?

A. Not that I can remember.

Q. You would not say that you didn't, would you?

A. I cannot say that I didn't. I took the cream the way I got it.

Q. Do you not know whether it was doctored up with [fol. 23] butter milk or not?

A. No, I did not doctor it up.

Q. If it was doctored up, it would be harder to test as to butterfat?

A. No.

Q. It would not?

A. No, sir.

Q. You do not know whether it was the same that you sold out of the same cans at Madelia, at Mountain Lake and at Bingham Lake?

A. Bingham Lake and Mountain Lake were the same kind of cream.

Q. You do not remember what cans you sold out of?

A. I could not say.

Q. You cannot say whether it was the same can you sold out of Madelia that you sold out of Bingham Lake or Mountain Lake?

A. I did not sell out of the same can; we had three cans of cream.

Q. You had three cans of cream?

A. Yes, sir.

Q. You bought those all at the same place?

A. Yes, sir.

Q. Where did you buy them?

A. St. James.

Q. From whom?

A. St. James Ice Cream Factory.

Q. Did you test those cans yourself before you left on this trip?

A. We did.

Q. Do you remember what those cans showed?

A. Showed fifteen per cent on one and twenty on the [fol. 24] other.

Q. Now, the margin of error in the testing of that cream is something—two people do not always test cream exactly the same?

A. They should be.

Q. They don't always do it?

A. They might vary a trifle.

Q. But you do not know whether this cream that tested fifteen per cent had been diluted with some other butter milk or milk or not?

A. I could not say as to that.

Q. Didn't you add anything to this cream when you got it from the creamery?

A. No, sir; I just took it and tested it, and took it the way I got it.

Q. Got it all at the same place?

A. Yes, sir.

Q. Wasn't this cream that you purchased—fifteen per cent cream—wasn't that illegal cream?

A. No, sir.

Q. Doesn't it have to test eighteen per cent under the Minnesota law?

A. Absolutely not. There is no law on our statutes that indicates that, I do not believe, if you purchase the cream by the pound of butter fat.

Q. Well, now, in shipping cream, the transportation charge is based on the amount of cream isn't it?

A. Yes, sir.

Q. It doesn't make any difference whether it contains fifty per cent of butter fat or fifteen—the same transportation charge, isn't it?

A. Yes, sir.

Q. So where the butterfat is rich in cream, you can carry [fol. 25] more butterfat for fifty cents than you can where it is smaller in amount?

A. Yes. Absolutely.

Q. Well, that is one reason why cream that has a large per cent of butter fat is more valuable and will bring a higher price than cream that has a small per cent of butter fat?

A. That would be, you have got to pay transportation charges on it.

Q. So that you could afford to pay a higher price for cream that has a large per cent of butter fat than you would for a small per cent of butter fat?

A. It would be natural that you could.

Q. Now you say at Madelia there were two creameries?

A. Yes, sir.

Q. What other buying stations were there at Madelia?

A. I could not say as to that.

Q. There were a number of them?

A. There was one or two, but I would not——

Q. There were more buying stations there than there were at Mountain Lake and Bingham Lake, weren't there?

A. I could not say as to that.

Q. Yes, you can?

A. No, I cannot. I am a stranger down there.

Q. You are a stranger down there?

A. Yes, sir.

Q. So you did not know what the station was with regard to the condition as to cream down there—the competitive condition as to cream, did you?

[fol. 26] A. No, I did not know anything about that.

Q. Is there some agent that makes that territory customarily?

A. Yes.

Q. You were out of your territory when you were down there?

A. Yes, sir.

Q. And you do not know whether any of this cream had been doctored before you sold it or not?

A. I could not say.

Q. Do you know how many creameries there are at Lake Crystal?

A. Yes, sir.

Q. Lake Crystal is situated near Madelia isn't it?

A. Yes, sir.

Q. And they send out trucks from Lake Crystal to pick up cream out towards Madelia, do they not?

A. I could not say.

Mr. Flansburg: That is all.

Redirect examination by Mr. Finstad:

Q. Just a moment. Do you know the approximate weight of five gallon cream cans filled?

A. Yes.

Q. How much?

A. It weighs about forty pounds.

Q. An eight gallon can?

A. It weighs about sixty-five.

Q. And of a ten gallon can?

A. About eighty to eighty-five.

Q. Now, there is something here about the percentage [fol.27] of butter fat being different than where this cream tested at twenty per cent; about how much cream or butter-fat how much butter fat would there be, approximately, in a ten gallon can?

A. About sixteen pounds.

Q. In a ten gallon can?

A. Ten gallon can would be sixteen pounds.

Q. Of cream?

A. Yes, sir.

Q. And if the test was fourteen, how many pounds of cream—how many pounds of butter fat would there be approximately?

A. About eleven or something.

Q. And do you know whether or not these stations at this time were buying cream with butter fat ranging from fourteen per cent up to twenty and twenty-three per cent?

Mr. Flansburg: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial, conclusion of the witness, going outside of the issu in this case—what they were doing in other——

The Court: As I understand, it refers to these stations. The objection is overruled. You may answer.

A. They buy any kind of cream; it does not make any difference whether it contains ten, fifteen or twenty or forty. They buy all of it.

Mr. Finstad: I believe that is all.

Recross-examination by Mr. Flansburg:

Q. This was your only experience with them, this one time down there?

A. Yes, sir.

[fol. 28] Q. You don't know what they had at other towns as a matter of fact except from these three sales?

A. Yes, sir.

Q. That is all you know about it?

A. Yes, sir.

Q. Now, this cream was sold to them, to be shipped to Sioux City, wasn't it, Mr. Lohnbakken?

A. I suppose so; that is where they ship.

Q. That was understood at the time you sold it?

A. They did not say where they were going to ship it.

Q. You knew where they were going to ship it?

A. I knew who they bought for.

Mr. Flansburg: That is all.

Mr. Flansburg: I want to ask one more question.

Q. You do not know how this cream was actually shipped—whether it was shipped in five gallon, in eight gallon or ten gallon cans, do you?

A. I could not say how it was shipped—the customary way.

Q. I say you do not know how this particular cream was shipped?

A. I do not know.

Mr. Flansburg: That is all.

Redirect examination by Mr. Finstad:

Q. What is the customary way of shipping cream from these stations?

Mr. Flansburg: That is objected to, if the Court please, [fol. 29] for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled. You may answer.

A. The customary way is we have to put it all together in the container they are shipping, and they ship it that way.

Mr. Finstad: That is all.
Mr. Flansburg: That is all.
The Court: That is all.

(Witness excused.)

L. R. Runke, a witness introduced on the part of the State, being duly sworn, gave the following testimony:

(Examined by Mr. Finstad:)

Q. What is your name?
A. L. R. Runke.
Q. Mr. Runke, where do you live?
A. I live at Wilder, Minnesota.
Q. What is your business?
A. Creamery Inspector.
Q. How long have you been connected with that business?
A. About three years.
Q. Before that, what business were you engaged in?
A. Creamery business—butter maker.
Q. Operating a creamery?
A. Yes, sir.
Q. Where is your territory that you operate in?
A. Southwestern Minnesota.
Q. Does that include Bingham Lake, Mountain Lake and [fol. 30] Madelia, these stations that have been mentioned here?
A. It does.
Q. And have you had occasion to observe how these stations customarily ship their cream to Sioux City?
A. I do.
Q. Will you state how that is usually done?
A. It is customary among the different creamery concerns—those of the Fairmont or Hanford or any of them—they usually have their own cans or containers to ship this cream in; otherwise it is all approximately shipped by ten gallon cans.
Q. These stations having received cream from various customers, do they keep this cream separate, or do they put this cream together in making these shipments.

A. They are emptied into their cans, and when the can is filled, why they take out another one and fill that one; it is mixed.

Q. Do you know whether they grade the cream into different grades of cream, in different containers, or whether they mix the cream together?

A. The cream is mixed—the most of it—mostly.

Q. Do you know what percentage of cream is usually contained—what percentage of butter fat is contained in the cream that is delivered at the stations ordinarily how does it vary?

Mr. Flansburg: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial, not within the issues, no foundation laid.

[fol. 31] Question withdrawn by Mr. Finstad.

Q. Do you know whether these stations commonly buy butter fat containing less than fourteen per cent or buy cream containing less than fourteen per cent of butter fat?

Mr. Flansburg: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial; not within the issues; no foundation laid.

The Court: Objection overruled. He may answer.

A. Why, the common cream buyer buying for manufacturing usually buys the percentage of fats of the cream it might test forty and five per cent.

Mr. Flansburg: Move to strike out the answer as not responsive.

The Court: The motion is denied.

Q. In observing the shipments of cream, Mr. Runke, at these different stations, do you know whether there is any appreciable difference in the percentage of butterfat contained in the shipments made say Madelia, Bingham Lake and Mountain Lake?

Mr. Flansburg: Same objection.

The Court: The question is if you know. Answer Yes or No.

A. Why, I should think it would average about the same.

Mr. Flansburg: Move to strike out the answer as not responsive.

The Court: The question is whether you know; that is what he asked. You can answer Yes or No.

A. I would say yes—it is about the same.

[fol. 32] Mr. Flansburg: Move to strike out the answer as not responsive.

The Court: The motion is denied.

The Court: The latter part may be stricken out as not responsive.

Q. Is there any appreciable difference, Mr. Runke, in the percentage of butter fat in the shipments made out from those points?

Mr. Flansburg: Same objection.

The Court: Objection is overruled. He may answer.

A. There is no difference as far as——

Q. As far as the averages go, they are about the same; is that it?

Mr. Flansburg: Same objection.

The Court: Same ruling.

A. Yes, sir.

Q. During the time that you have been working for the state of Minnesota, you have observed the prices paid by the Fairmont Creamery Company at these various stations, Mr. Runke?

A. Yes, sir.

Q. For how long a time?

A. This particular case that we are on now?

Q. For how long a time?

A. Off and on for three years.

Q. Do you know whether the Fairmont Creamery Company in June 1923 paid any different price for low test cream than they did for high test cream based upon the butter fat percentage?

Mr. Flansburg: That is objected to, if the Court please, for the reason that it is calling for the conclusion of the witness; no foundation laid; not within the issues, what [fol. 33] they did in any other particular instance than the one in question.

Mr. Phillips: It appears that the cream varied in the test made. Of course, the shipment is by the weight of the cream containing the butter fat; that is the basis of the cost of transportation. Now, as I understand it—as I understand the situation, we propose to show that taking the average cream by any general bulk at these three stations, they averaged the same; consequently in buying from a particular customer, there was no difference made in the price paid according to low or high test, because they were buying butter fat.

Mr. Flansburg: This witness could not lay a foundation to testify as to what happened in regard to this company other than what he personally observed, and what their habit is or customary in regard to any other particular sales than the particular sales in question is not in issue. We are being prosecuted here under this law for selling at two different prices. Of course, the only purpose of this trial is to raise a question—a constitutional question that would arise under this statute.

The Court: I think that question is in the case here.

The Court: The objection is overruled. You may answer.

Question read to the witness by the Court Reporter.

A. No.

Mr. Finstad: That is all.

Mr. Flansburg: I guess that is all.

The Court: That is all, Mr. Runke.

Mr. Finstad: The State rests.

[fol. 34] The Court: The State rests.

The Court: The case is for the Defendant.

Whereupon Mr. A. D. Bland was called as a witness for the Defendant.

Mr. Flansburg: Before this witness is sworn, let the record show that we made a formal motion to dismiss the case on the ground that the facts shown are insufficient to constitute an offense, and that the statute is unconstitutional on the specific grounds set out in our motion.

The Court: Motion is denied.

Mr. Borst: Exception taken.

A. D. Bland, a witness introduced on the part of the Defendant, being duly sworn, gave the following testimony:

(Examined by Mr. Flansburg:)

Q. You may state your name, occupation and residence, Mr. Bland?

A. A. Bland, Sioux City, Iowa. Manager of the Fairmont Creamery—General Manager of the Fairmont Creamery at Sioux City.

Q. How long have you been engaged in the creamery business?

A. About twenty-two years.

Q. And at what place—where did you begin?

A. Began at Kansas.

Q. How long have you been engaged in the business in Minnesota?

A. About thirteen years.

Q. Where did you begin in business, in Minnesota?

A. Out of Omaha.

[fol. 35] Q. What were your duties in this territory in Minnesota?

A. General territory superintendent.

Q. How long did you continue in that employment?

A. Nine years.

Q. What did your territory, at that time, consist of, in Minnesota?

A. Consisted of the southwestern part of Minnesota.

Q. After that employment ended, then where were you employed?

A. Sioux City, Iowa.

Q. With what company?

A. The Fairmont Creamery Company.

Q. Are you so employed now?

A. Yes, sir.

Q. Have your duties been the same since the beginning of that employment up to the present time?

A. Yes, sir, Sioux City.

Q. What are those duties?

A. I have charge of the buying and the management of the plant. The manufacture at Sioux City.

Q. What territory in Minnesota do you cover, where you have supervision of, in your business?

A. Practically the south half of Minnesota.

Q. Have you observed the condition of the creamery business in the buying and selling of butter fat? During the nine years in the southern half of Minnesota?

A. Yes, sir.

Q. Are you acquainted with the different creameries that [fol. 36] are established in the southern half of Minnesota?

A. Most of them.

Q. Describe the different kinds of creameries that there are?

A. Well, we have what is called co-operative creameries and independent creameries.

Q. Now what are those creameries? What is a co-operative creamery?

A. A co-operative creamery is a creamery that is owned and controlled by farmers who generally buy stock; hold stock in the creamery.

Q. How many such creameries are there in the territory in which you buy cream?

A. Well, there is close—there are close to three hundred of the co-operative and independents in the southern part of Minnesota.

Q. How many buying stations are there of different concerns in the territory in which you buy cream?

A. Well, I would say, approximately, one thousand.

Q. Have you noticed, during your experience in Minnesota, the condition with reference to the price that is paid for cream at different localities in Minnesota—one locality with reference to another—as to whether the price is different?

A. Yes, sir, it has always been different since I have been acquainted with conditions up here.

Q. Now, in the different cities and different towns in the southern half of Minnesota where you have been buying cream for the last nine years, what can you say with reference to there being a variation in price at different places?

[fol. 37] Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial under the issues of this case. This prosecution is brought under the statute which makes it unlawful for anyone purchasing butter fat at two or more places in the

state of Minnesota, to pay a different rate or a higher rate at one point than is paid at another point, after making due allowance for the difference in the cost of transportation from the point of purchase to the point of sale or manufacture; in other words, it is unlawful to pay different price unless that different price is caused by the difference in the cost of transportation. Now, that being the law, under which this case is brought, I don't see any relevancy or materiality in the question asked.

Mr. Flansburg: We wish to show a competitive situation in Minnesota. We wish to show, particularly, the situation with reference to these particular towns where these purchases were made, for the purpose of having the Court pass upon the validity of this statute.

Now, formally, this statute is open to construction. This statute says where one person shall discriminate between different sections—discriminate by paying different prices. Now, it does not say wherever he shall pay that price, but it says wherever he shall discriminate. Our purpose is to get this case to the Supreme Court, upon this question, so that Your Honor should be lenient in the receiving of testimony here.

The Court: I think you are taking in too much territory in taking half of the State, in nine years' time. I think we shall confine it to the conditions as they existed there, [fol. 38] even if you want to bring in this question that you speak of.

Mr. Flansburg: We would like to put this testimony in for the purpose of the record. Of course, if it is immaterial, it would do no harm.

The Court: I think the objection should be sustained. You are going way outside. The objection is sustained.

Mr. Flansburg: We offer to prove by this witness that during the last nine years, the prices paid for butter fat in the southern half of Minnesota, at the different towns has varied in each town; that the variation has been from one cent to eight cents; that such price is exclusive of transportation charges; that such variation is the normal condition of the market in the sale of cream and butter fat, and is the result, entirely of competitive conditions; that in certain localities there are many more competitors than there are in others; that the quality of cream differs in

different localities; that the equipment and efficiency of creameries in the various localities differ, and that each of these things enters into the price that is paid for the butter fat in the particular locality where the sale is made, and that this variation in price, in each town, in the southern half of Minnesota, existed on the eleventh day of June, 1923, and that such variation is constant, and has existed for nine years previous to that time, and that these variations in price are due entirely to the economic conditions in each locality, and to competition.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial; [fol. 39] not tending to prove any defense of this cause of action.

Mr. Flansburg: No objection being made as to the question being broad enough to cover the entire offer.

The Court: As I understand, the question that you want to determine here is the constitutionality of this law. I cannot see how this evidence would affect it one way or the other.

The Court: Objection is sustained.

Q. Well, now, Mr. Bland, what can you say with reference to the variation in price existing between the towns of Bingham Lake, Mountain Lake and Madelia, on the day in question—June eleventh, 1924—was there a variation in the price that was being paid at those places?

A. Yes, sir.

Q. What was the price on that day—that was being paid by all the dealers at Madelia?

Mr. Phillips: That is objected to, if the Court please, for the reason that — is incompetent, irrelevant and immaterial, not within the issue of this case.

The Court: Objection is sustained.

Mr. Flansburg: Exception taken.

Mr. Flansburg: We offer to prove by the witness that on the date in question—June eleventh, 1923—each of the dealers at Madelia was paying thirty-eight cents a pound for butter fat, the same price at which the defendant Fairmont Creamery Company purchased the cream in this particular instance.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial; not within the issues of this case.

[fol. 40] The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. What other dealers were there at Madelia purchasing butter fat on the date in question besides the Fairmont Creamery Company?

A. From my memory, why the Worthington Creamery Company, of Worthington, Minnesota; that Fairmont Packing Company at Fairmont, Minnesota.

Q. Was that company, in any way, connected with the Fairmont Creamery Company?

A. No, sir.

Q. It was a distinct and different kind of corporation?

A. It was a distinct and different kind of corporation. The Madelia Produce Company, who made some butter and shipped part of its cream, and the Co-operative Creamery there.

Q. How many creameries were there then that were making butter at Madelia?

A. Two.

Q. What were they?

A. One was co-operative creamery; the other one was independent.

Q. What was the name of the independent?

A. Madelia Products Company, I believe.

Q. How many different companies were purchasing butter fat at Madelia besides these, just two others?

A. Two others with ourselves.

Q. So that there were five purchasers of butter fat at Madelia?

A. Yes, sir.

Q. How many purchasers were there at Lake Crystal? [fol. 41] A. Lake Crystal. I am not positive but I think there were four; I cannot name them.

Q. Were there some creameries there at Lake Crystal?

A. Yes, sir, there was one co-operative creamery?

Q. Where was the territory from which these two points —well first describe the location of these towns with reference to each other?

A. Well, in relation to Madelia, Lake Crystal was twelve miles away.

Q. Where was the territory from which they bought most of their cream?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: I don't see how Lake Crystal can have anything to do with this.

The Court: The objection is sustained.

Mr. Flansburg: We offer to prove by the witness that the territory from which these two towns purchase most of their butter fat lays between the two towns; that the territory lying between the two towns was a large producer of cream, and that there were many competitors in the territory purchasing cream.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. Do you know whether or not any of the creameries or dealers at Lake Crystal send out trucks into the country towards Madelia in order to buy cream?

[fol. 42] A. They did.

Mr. Phillips: We object to that and ask that the answer be stricken out.

The Court: It may be stricken out. Same ruling.

Mr. Flansburg: The defendant offers to prove by the witness that the dealers at Lake Crystal sent their trucks out into the territory towards the town of Madelia, in order to pick up cream at the farmers' doors, and that the competition between the purchasers at these two points was keen.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial as to the issues.

The Court: Objection sustained.

Mr. Flansburg: Exception taken.

Q. Now, how were the roads between Lake Crystal and Madelia?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Flansburg: The defendant offers to prove by this witness that the roads for automobile travel were in fine condition between these two towns, and that the railroad facilities were easily adequate to allow either town to reach into the territory of the other and purchase cream.

Mr. Phillips: That is objected to, in the Court please, for the reason that it is incompetent, irrelevant and immaterial under the issues of this case.

The Court: Objection sustained.

Mr. Borst: Exception taken.

[fol. 43] Q. What was the effect of this situation on the price of butter fat at Madelia?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial under the issues of this case.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that the effect of this condition was to raise the price paid for butter fat at Madelia to thirty-eight cents, and that thirty-eight cents was the price fixed by competition between these various buyers.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial under the issues of this case, and not tending to establish any defense to the offense charged.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. Will you explain how this did affect the price, how the price came to be thirty-eight cents?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial under the issues of this case.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that the Farmers Co-operative Creamery Company at Lake Crystal began paying the price of thirty-eight cents, and

going out into the territory towards Madelia and picking up cream, and that the buyers at Madelia raised their price to thirty-eight cents, in order to hold to themselves the purchase of the cream which they had been getting in that [fol. 44] territory.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial under the issues of this case.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. This then was to prevent the buyers at Lake Crystal from taking away from the buyers at Madelia all their patronage, was it not?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial under the issues of this case.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that the buyers at Madelia made the price, fixed by the dealers of Lake Crystal, in order to prevent the dealers of Lake Crystal from taking away from the dealers at Madelia their patronage and business which they theretofore enjoyed and had.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial under the issues of this case.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. You may state whether or not the Fairmont Creamery Company paid thirty-eight cents after the Farmers Co-Operative Company and the dealers at Lake Crystal began paying that rate in order that the Fairmont Creamery Company could hold to itself the business which it had theretofore enjoyed?

Mr. Phillips: That is objected to, if the Court please, [fol. 45] for the reason that it is incompetent, irrelevant and immaterial; not within the issues of this case, not tending to establish any defense to the offense charged.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. Was there a creamery located at Bingham Lake?

A. No sir.

Q. Were there buying stations at Bingham Lake?

A. Yes sir.

Q. Did you find the conditions at Bingham Lake that you have described at Madelia, or surrounding Madelia?

A. No, sir.

Q. What can you say with reference to competition at Bingham Lake for the purchase of butterfat?

Mr. Phillips: That is objected to, if Your Honor please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that there were only two concerns purchasing butterfat at Bingham Lake, and that neither of these concerns had raised the price from thirty-five cents.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. You may state what the defendant Fairmont Cream-[fol. 46] ery Company did at Bingham Lake with reference to paying the price which they paid at Bingham Lake?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is too indefinite.

Q. Did the Fairmont Creamery Company pay the price that it found being paid at Bingham Lake?

Mr. Phillips: That is objected to, if Your Honor please, for the reason that it is incompetent, irrelevant and immaterial and not within the issues of the case.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that the Fairmont Creamery Company simply paid the price which they found being paid for butterfat at Bingham Lake.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial and not within the issues.

The Court: Objection sustained.

Q. At Mountain Lake, you say there was a co-operative creamery?

A. Yes, sir.

Q. What price did the Co-operative Creamery pay on June eleventh, 1923?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial; not within the issues of this case.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that [fol. 47] the Co-operative Creamery Company at Mountain Lake was paying on this day thirty-five cents a pound for butterfat.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. What price did the Fairmont Creamery Company pay at this place on that day?

A. Thirty-five cents.

Q. Is there a difference in the price paid for butter fat owing to the quality of the butter fat?

A. Yes, sir.

Q. Has the management of the Farmers' Co-operative Company at Lake Crystal changed hands since the date of this sale?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that the Farmers' Co-operative Company at Lake Crystal has changed hands since the date of the sale of butter fat in this instance.

Mr. Phillips: That is objected to, if Your Honor please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. And you may state whether or not the new management lowered the price of butter fat at Lake Crystal?

Mr. Phillips: That is objected to, if the Court please, for [fol. 48] the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that when the management of the Farmers' Co-operative Company at Lake Crystal changed hands that it no longer paid the price of thirty-eight cents for cream, and that the price of cream at that place and at Madelia was lowered.

Mr. Phillips: That is objected to, if Your Honor please, for the reason that it is incompetent, irrelevant and immaterial; not within the issues of this case; not tending to establish any defense to the offense charged.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Mr. Flansburg: I think that is all.

Cross-examination by Mr. Phillips:

Q. Mr. Bland I believe you testified that there were in the neighborhood of three hundred co-operative and independent companies operating in the southern part of Minnesota; isn't it a fact that most of these companies purchase at a single point or place?

A. Yes, sir, most of them do, I believe.

Q. Are there any that you know of that purchase at more than two or three different places?

A. Only that they are operating it affects the price in the adjoining town.

Q. There is a third class known as centralizers aren't there? You have spoken of co-operative companies and independent companies?

A. And centralizers. Yes, sir.

Q. And centralizers?

[fol. 49] A. Yes, sir.

Q. And centralizers are companies which have some central point of manufacture and sale, and a number of points of purchase; is that correct, and that the butter fat or cream or milk that is purchased at these various purchasing points are shipped to the central plant or plants for manufacture and sale?

A. Yes, sir.

Q. And the Fairmont Creamery Company, the defendant in this case, is what is commonly known as a centralizer?

A. Yes, sir.

Q. How many purchasing stations has the Fairmont Creamery Company in the state of Minnesota?

A. Well, I cannot answer that question correctly.

Q. Well, approximately, Mr. Bland?

A. I would say sixty.

Q. About sixty?

A. Yes sir.

Q. How many purchasing stations has it in southern Minnesota, approximately?

A. Well, that is a guess, too. We have a factory at Moorehead that I have no jurisdiction over. In Southern Minnesota, we have approximately—it runs from forty-five to fifty-five stations.

Q. The butter fat that is purchased at these forty-five or fifty-five stations in southern Minnesota is shipped to Sioux City?

A. Yes, sir.

Q. And there manufactured or sold, isn't it?

A. Yes, sir.

[fol. 50] Q. Now, I believe you stated, Mr. Bland, that there is a different price for cream owing to the quality?

A. There has been. Yes, sir.

Q. Now, isn't it a fact that on the eleventh day of June, 1923, you were purchasing on the basis of butter fat?

A. No, sir, not altogether. We never did.

Q. Didn't that constitute the bulk of your purchases?

A. Constitute the bulk. Yes, sir.

Q. At that time, at those places?

A. At that time, at those places we bought cream.

Q. And at that time on the eleventh day of June?

A. We bought both sour and sweet cream on that day; we always bought more for sweet than for sour.

Q. These purchases were sweet cream, weren't they?

Mr. Flansburg: That is objected to, if the Court please, as not cross examination. We did not go into that.

The Court: You had him testify as to the difference in the quality of butter fat.

Mr. Flansburg: Not of these particular sales.

The Court: Objection overruled. You may answer.

Mr. Flansburg: I want to add the objection no foundation laid.

The Court: Objection overruled.

Q. Do you know about these particular purchases that [fol. 51] were mentioned in this case?

A. I know about them, but I do not know whether they were sweet or sour; I imagine they were sour.

Mr. Finstad: We move to strike out the last part of the answer that he imagines.

The Court: That part may be stricken out as not responsive.

Q. All sweet cream purchased at those three different points on the eleventh day of June, 1923, were purchased on the basis of the butter fat, weren't they?

Mr. Flansburg: That is objected to, if the Court please, for the reason that it is calling for the conclusion of the witness; no foundation laid, this witness not having been present, showing no direct knowledge.

Mr. Flansburg: Also assuming facts not known.

The Court: Objection overuled.

A. I could not say whether it was sweet or not. It was impossible to say whether it was sweet; but not on the sweet and sour basis.

Q. The question is all sweet or sour cream purchased at any of these stations on the eleventh day of June, 1923, were purchased on the basis of the butter fat content?

Mr. Flansburg: That is objected to, if the Court please, for the reason that it is calling for the conclusion of the witness; not showing that this witness knew; nor the character of the cream, nor the price paid.

The Court: Objection overruled. You may answer.

[fol. 52] A. Really, I don't know. I cannot answer the question because he asks me the question of sweet cream. I do not know whether the cream was sweet or not. I was one hundred miles from the point——

Mr. Phillips: We are not asking you to pass upon that.

Question withdrawn by Mr. Phillips.

Q. I believe you stated you were the manager in charge of this southwestern territory?

A. Yes, sir.

Q. For the Fairmont Creamery Company?

A. Yes, sir.

Q. And were manager in charge on the eleventh day of June, 1923?

A. Yes, sir.

Q. And had been for some time prior to that?

A. Yes, sir.

Q. And the villages of Madelia, Bingham Lake and Mountain Lake were each within the territory over which you were manager?

A. Yes, sir.

Q. And as a part of your duties as general manager, you gave instructions to your various purchasing agents as to prices?

A. Yes, sir.

Q. And did so in these cases?

A. Yes, sir.

Q. And you have reports from the various purchasing agents showing from day to day the price paid?

A. Yes, sir.

Q. Of commodities purchased?

[fol. 53] A. Yes, sir.

Q. And you know from day to day what the price was paid at the various purchasing points in the state of Minnesota within the territory over which you are manager?

A. Yes, sir.

Q. Now, I will ask you Mr. Bland, was all of the sweet cream purchased at Madelia on the eleventh day of June, 1923, purchased at a price based upon the butter fat content?

Mr. Flansburg: Same objection.

The Court: Objection overruled.

A. I cannot tell you whether it was sweet or not because the distance is too great between my office and that place. I cannot answer that; I do not know.

Q. I am asking you whether this particular cream was sweet or sour?

A. I cannot answer that question.

Q. Was there any sweet cream purchased at Madelia on that date that was not purchased on the basis of the butter fat content?

Mr. Flansburg: That is objected to, if the Court please, for the reason that it is calling for the conclusion of the witness; no foundation laid. This witness was not present and does not know personally what sales were made or what prices were fixed for paying them.

Q. You fixed the prices that were to be paid at Madelia on that date?

Mr. Flansburg: That is objected to, if the Court please, for the reason that it is calling for the conclusion of the witness.

The Court: Objection overruled.

[fol. 54] A. I authorized them to meet the price paid that day; I did not fix them.

Q. You did not establish the particular prices?

A. No, I did not at Madelia.

Q. You are familiar with the practice of handling cream and butter fat purchased by your company at Madelia?

A. Yes, sir; some.

Q. Isn't it a fact, Mr. Bland, that there is no difference in the price paid for butter fat, dependent upon the test of the cream from which it is obtained?

Mr. Flansburg: That is objected to, if Your Honor please, for the reason that it is calling for the conclusion of the witness.

The Court: Objection overruled. You may answer the question.

A. In some cases there is and in some cases there is not, depending upon the kind of an operator you have to deal with.

Q. I am speaking of the operator in charge of the Madelia station on the eleventh day of June, 1923?

A. I would say yes.

Mr. Phillips: I believe that is all.

Redirect examination by Mr. Flansburg:

Q. Now, Mr. Bland, you say that you sent out authority to your agents to meet the prices they found were being paid in the different points in your territory?

Mr. Phillips: That is objected to, if the Court please, for [fol. 55] the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Yes, sir.

Q. And what were those prices paid at the various places in Minnesota?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: It is. Objection is sustained.

Q. Could you tell from your office what prices were being paid or going to be paid at any particular locality in the state of Minnesota?

A. No, sir, until they called up and notified me.

Q. And then what instructions would you give to your agents at the particular locality calling up?

Mr. Phillips: That is objected to, if Your Honor please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled. You may answer.

A. We sent out instructions in regard to the price, and in that event we state if competition is paying more to advise us, and they call us on the telephone or wire that competition is paying more; we get in touch with them, and we authorize them to meet the competition in that particular town.

Mr. Phillips: Move to strike out the answer of the witness for the reason that it is incompetent, irrelevant and immaterial under the issues in this case.

The Court: I think it may be material, showing that they had authority from him.

[fol. 56] The Court: Motion is denied.

Q. What is the price that you sent out? The price that is fixed by the butter market?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Flansburg: We offer to show by this witness that the defendant Fairmont Creamery Company sends out a price based upon the New York butter market, and which is commonly used as a basis of price for the payment of butter fat, and that the defendant Fairmont Creamery Company does not pay more than this price at any locality except where some other dealer pays a higher price; that the Fairmont Creamery Company is compelled to meet the price in order to protect its business which it has been enjoying there.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial, not within the issues of this case.

The Court: Objection sustained.

Mr. Flansburg: Exception taken.

Mr. Phillips: That is all.

Mr. Flansburg: That is all.

The Court: That is all.

J. J. Farrell, a witness introduced on the part of the Defendant, being duly sworn, gave the following testimony:

(Examined by Mr. Flansburg:)

Q. What is the name?

A. J. J. Farrell.

[fol. 57] Q. You may state your residence, Mr. Farrell?

A. St. Paul, Minnesota.

Q. And what is your business?

A. I am in the creamery work—educational work—secretary of the dairy products assocation of the Northwest.

Q. Who are members of the association?

A. It embodies manufacturers of creamery butter and ice cream.

Q. Who are members of the association?

A. Independent Creameries and the class of creameries known as central plants.

Q. Are co-operative members of the association?

A. Not in a measure that we consider their membership. No.

Q. How long have you been engaged in the creamery business in Minnesota?

A. Since 1887.

Q. Did you ever operate creameries yourself?

A. Yes, sir.

Q. At what places and for what length of time?

A. Scott county and Carver county, I operated the creameries for twenty-two years.

Q. When did you cease operating those creameries?

A. In 1918 the last one.

Q. Have you been connected with this association since that time?

A. This association and the National, their products committee. Yes.

Q. What are your duties in this position with this asso-
[fol. 58] ciation, Mr. Farrell?

A. The duties are largely educational as to production of dairy products and transportation, as well as manufacture. Manufacurting problems.

Q. Do you come in direct touch with the creamery business in each of the localities of the state?

A. Mostly so, different states.

Q. Are you acquainted with the number of creameries there are in operation in the state of Minnesota today?

A. Yes, sir.

Q. On June eleventh, 1923?

A. Yes.

Q. And what is the number? What was the number at that time?

A. The best information I have on it is 841 creameries at the present time, and I believe 839 last year. There may be a discrepancy there of one or two.

Q. What number of those creameries are what are called independent creameries?

A. The way we have them listed is 179 independent and central plants, the balance being co-operative.

Q. How many then are co-operative approximately?

A. Six hundred and sixty-three I believe is correct at the present time.

Q. And are those co-operative creameries scattered all out throughout the state?

A. In every county practically; yes.

Q. Are those co-operative buying in all the territory of the state?

[fol. 59] A. No, the co-operative creamery, with the exception of those which run cream gathering routes buy in one locality.

Q. But the territory is reached by some cooperative or other company, the whole territory of the state is it?

A. Yes, the entire state of Minnesota is reached by either independents or agencies purchasing cream.

Q. How many buying stations are there in the state of Minnesota?

A. I have not the exact tab on it but I should say, you mean cream buying stations outside of creameries and cheese factories—I should say there were sixteen or seventeen hundred; I have not the exact list.

Q. How long have you observed the prices paid for butter fat in the state of Minnesota with reference to the different localities all over the state of Minnesota?

A. I have always observed that since I have been in the business.

Q. For how many years would you say?

A. Oh thirty years.

Q. Thirty years?

A. Yes, sir.

Q. What can you say with reference to whether or not that price varies with each town?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that [fol. 60] the price paid for butter fat varies in each town and locality of the state, and has so varied for the last thirty years, and that such condition is a normal condition brought about by competition, by the quality of the cream

found in the locality and by the nature of the local competitiors.

Mr. Phillips: That is objected to, if the Court pleases, for the reason that it is incompetent, irrelevant and immaterial; not within the issues of the case; not tending to establish any defense to the offense charged.

The Court: Objection sustained.

Mr. Borst: Exception taken

Q. And how much would you say that variation would range?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that the price varies from one cent to eight cents or nine cents in the different localities and towns and cities in the state, and that such price is exclusive of transportation charges, and that such range of prices of variation has been a fact, has been constant for the last thirty years, and that it is a normal condition brought about by competition, quality of the cream purchased at these localities, and the nature, ability and efficiency of the local competitors.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial; not within the issues of this case.

[fol. 61] The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. What would be the result, Mr. Farrell, if a level price could be fixed in the state at the prices which are the highest prices being paid?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial; no proper foundation laid; calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that if any level of prices was fixed either at the top of the prices which are customarily paid, or at any other level, that a great many creameries which are purchasing butter

fat and are not paying the price now and have not been paying the price which would be as high as that level of price would be compelled to go out of business.

Mr. Phillips: Same objection as last made for the State.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. What is the value of the investment of the creameries in the state, Mr. Farrell, could you estimate that?

A. The entire investment?

Q. Yes.

A. Oh, it would run into about—it would run into about—between eight and nine hundred million dollars; original creameries and original investment would run from—about three hundred and fifty thousand dollars.

Q. Now, what can you say with regard to many of these creameries, with respect to their ability to pay higher prices [fol. 62] than they have been paying in those localities?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that a vast number of the creameries which are buying butter fat could not afford to pay and could not pay a higher price than the price which they have been paying in the locality where they operate without destroying their own business and causing their own business to be unprofitable.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Mr. Flansburg: That is all.

Mr. Phillips: That is all, Mr. Farrell.

The Court: That is all.

(Witness excused.)

M. S. HARTMAN, a witness introduced on the part of the defendant, being duly sworn, gave the following testimony:

(Examined by Mr. Flansburg:)

Q. What is your name?
A. M. S. Hartman.
Q. What is your occupation? Residence?
A. A citizen of Omaha, Nebraska, and I am employed by the Fairmont Creamery Company.
Q. How long have you been employed by the Fairmont Creamery Company, Mr. Hartman?
[fol. 63] A. Eighteen years.
Q. Have you made a study of the creamery business?
A. Yes, sir.

Book marked Defendant's Exhibit No. 1 by the Court Reporter for identification.

Mr. Flansburg: It is stipulated that Defendant's Exhibit No. 1 is a part of the official report of the Commissioner of the State Dairy & Food Department of the state of Minnesota, for the year 1924, and that Defendant's Exhibit No. 1 covers statistics and matter pertaining to the creamery business operated in 1923.

We offer in evidence Defendant's Exhibit No. 1, that part, these columns which are headed at the top by the word county; by Co-op., Independent and Centralized, and the column headed by the title average test cream, and the column headed by the title average price paid per pound for butter fat.

Mr. Flansburg hands Defendant's Exhibit No. 1 to Mr. Phillips for his inspection.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: I think it is. Objection should be sustained.

Mr. Flansburg: We offer in evidence those portions of defendant's Exhibit No. 1 and the explanation of the exhibit as follows: That under the word county are the names of the counties in the state of Minnesota; that under the [fol. 64] word Co-op. in the column are the number of co-operative creameries operating in that county; under the name independent the number of independent creameries operating in that particular county; and under the name

cent the number of centralized creameries operating in that particular county shown; under the column average test cream is the average test for the year in that particular county of the cream purchased in that county for the entire year; that under the column entitled Average price paid per pound for butter fat is indicated the price paid in that particular county, which price is the average normal price paid in that county for the year 1923, exclusive of transportation charges.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. Now, Mr. Hartman, have you prepared an exhibit based upon the data, as shown by Defendant's Exhibit No. 1, setting forth by the blue print an illustration of the relation of these prices to each other, as they are shown to have been fixed and paid in the different counties in the state?

A. I have.

Q. Handing you this Defendant's Exhibit No. 2, which has been marked by the Court Reporter for identification, I will ask you if that is the exhibit that you have prepared from the data in Defendant's Exhibit No. 1, and to explain the meaning of this exhibit.

[fol. 65] Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent and immaterial, and based upon data that is not before the Court.

The Court: Objection sustained.

Mr. Flansburg: We offer Defendant's Exhibit No. 2 in evidence with the explanation that under the word County is given the name of the county shown by the Commissioner's report Defendant's Exhibit No. 1; under the column Number of creameries as shown the number of creameries doing business in the county as shown by Defendant's Exhibit No. 1 and the line marked average line 47.71 cents is the average price paid over the state for butter fat during the year 1923, as shown by Defendant's Exhibit No. 1, and by the Dairy Commissioner's report; and each of the lines shown opposite the name of the county indicates the point and price which is the average price

averaged from all the purchases made in the particular county named, of butter fat, which was purchased in the county during the entire year of 1923, the Exhibit indicating the different level of prices paid in each of the counties of the state during the year 1923.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent and immaterial.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Q. Mr. Hartman, what enters into the matter of determination of prices paid for butter fat in the different localities in the state of Minnesota at the present time?

[fol. 66] Mr. Phillips: That is objected to, if Your Honor please, for the reason that it is irrelevant and immaterial.

The Court: Objection sustained.

Mr. Flansburg: We offer to prove by this witness that the price of butter fat is determined by competition and by the local conditions in each of the counties.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent and immaterial; not tending to prove any defense to the offense charged.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Mr. Flansburg: We offer to prove by the witness that the price of butter fat did on the day in question and has for years previous to the day varied from one to eight cents in the different towns and localities in the state and that such price is exclusive of transportation charges.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial; not tending to constitute a defense to the offense charged.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Mr. Flansburg: I believe that is all.

Mr. Phillips: That is all.

The Court: That is all.

(Witness excused.)

A. D. Bland, recalled for further examination, testified as follows:

[fol. 67] (Examined by Mr. Flansburg:)

Q. Mr. Bland, you may state whether or not the variation in price in the state of Minnesota, in different localities,—you may state what the variation in price is in the different localities and has been during your experience with the business?

Question withdrawn by Mr. Flansburg.

Q. Mr. Bland, you may state how the price varies—has varied during your experience with the creamery business, in the state of Minnesota, in the different localities where you have had observation?

Mr. Phillips: That is objeced to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Borst: Exception taken.

Mr. Flansburg: We offer to prove by this witness that the variation in price existed on the day in question, and that such variation was constant for nine years previous thereto; and that such variation was from one cent to eight cents in the different localities, and such variation was exclusive of transportation charges.

Mr. Phillips: Same objection as last above stated.

The Court: Same ruling.

Mr. Borst: Exception taken.

J. J. Farrell, recalled for further examination, testified as follows:

(Examined by Mr. Flansburg:)

Mr. Flansburg: We offer to show by Mr. J. J. Farrell that the variation in price, as we offered to prove by him, was a variation from one to eight cents and exclusive of [fol. 68] transportation charges.

Mr. Phillips: That is objected to, if the Court please, for the reason that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Borst: Exception taken.

M. S. HARTMAN, being recalled for further examination, testified as follows:

(Examined by Mr. Flansburg:)

Q. Mr. Hartman, you may state whether or not the company can afford to pay more for cream which has a large content of butter fat than where the content is small?

A. Yes, sir.

Q. And state why?

Mr. Phillips: That is objected to, if the Court please, for the reason that it is irrelevant and immaterial. I call attention to the nature of the question. He asks whether or not they can do it; he did not ask about the practice that prevailed at that time or any other time.

Question withdrawn by Mr. Flansburg.

Q. You may state how the transportation charge, the shipment of cream and butter fat may be affected by the shipment in the different sized cans that are used?

A. The transportation charge on a five gallon can is seventy per cent of the ten gallon can rate, and if shipments were made in five gallon containers quantities of ten gallon segregated would cost from a transportation standpoint one hundred and forty per cent of the ten gallon [fol. 69] rate. That would also vary of course with the butter fat density.

Mr. Phillips: He has already answered the question, Your Honor, and it is not responsive.

Q. You may state how that would vary according to the charge for it?

A. If cream contained fifty per cent butter fat and it were a ten gallon quantity, the rate fifty cents, the transportation charge would be one-tenth of a cent per pound for butterfat; if it contained fifteen per cent butter fat in a ten gallon can the transportation charge would be four and one-sixth cents per pound, or a little more than three cents per pound greater.

Q. And yet the price, the charge for hauling the can of cream is the same regardless of the butter fat content?

A. I took a fifty cent rate in considering that.

Mr. Flansburg: I believe that is all.

Cross-examination by Mr. Phillips:

Q. It is your practice in shipping cream or butterfat from your various purchasing establishments to Sioux City to ship in such cans as will enable you to transport it at the lowest cost?

Mr. Flansburg: That is objected to, if Your Honor please, for the reason that no foundation has been laid.

The Court: Objection is overruled. You may answer.

Question read to the witness by the Court Reporter.

A. Theoretically yes; practically no.

Q. What practical reason is there that you cannot transport it in ten gallon cans?

[fol. 70] A. Our agents attempt to keep what they consider the best grades of cream separate, and a good many times they will receive sixty-five pounds of high grade cream or seventy pounds and put it in a can—a ten gallon container, and they may have some real low grade cream which has been adulterated, or which has soured, or it may have become affected by feed like wild onions, or something like that. They ship that in separate cans, so that as a practical thing, we occasionally get pure cream in perhaps a large container. We do not have all of our stations supplied with five gallon cans, and on Saturday when they clean up, we have a small quantity of cream perhaps in a ten gallon can.

Q. Well, now Mr. Hartman, when you purchase cream or butter fat from a particular customer at the time of your purchase, you do not know how you are going to ship it, do you?

A. We might or we might not. If he had delivered us a full can, we would know exactly how we were going to ship it.

Q. Does he deliver it in your can?

A. In one of his cans, but it would fill one of our cans in filling it from his container to ours.

Q. As you purchase butter fat or cream from each individual farmer or customer, you pay a price taking into consideration the particular sized can in which his cream is to be shipped?

A. No, the competition controls the price.

Q. Then, in other words, you pay the price for your butter fat without regard to the particular can in which it is going to be shipped?

A. Yes, that is true.

Mr. Phillips: That is all.

[fol. 71] Mr. Flansburg: That is all.

The Court: That is all.

(Witness excused.)

Mr. Flansburg: The defendant rests.

The Court: Any further testimony on the part of the State?

Mr. Finstad: There is none.

The Court: The State rests.

The Court: Evidence closed.

Both parties having rested and the case having been submitted to the court, the court found as follows:

JUDGMENT

By the Court: It is the Judgment and findings of the court that the defendant is guilty as charged in the Complaint and Warrant and as punishment therefor it is adjudged and ordered that the defendant pay a fine of One Hundred Dollars.

A stay of twenty days is granted.

PLAINTIFF'S EXHIBIT "A"

Stub

Dated 6-11-23.
Shipping point Sioux City, Iowa.
Lbs. of Cream 27 Test 14 lbs. butter fat 378.
Price 35c Money —.
Corrections —.
Net amount $1.32.
Payable to L. Lahnbakken.
Fairmont Creamery Company, Sioux City, Iowa.

[fol. 72] Face of Check

The Fairmont Creamery Company

Original Cream Draft

This draft entered on Station Report No. 17902.
No. 123,224.

Station Bingham Lake, Minn., Date 6-11-23.

At sight pay to the order of L. Lahnbakken one 32-100, $1.32.

This draft is for cream only. Not good for more than $25.00.

To Fairmont Creamery Company, Sioux City, Iowa.
(Signed) Geo. Shuler, For the Fairmont Creamery Co.

Plaintiff's Exhibit "B"

On Stub

No. 368665.
Date 6-11-23.
Shipping point Sioux City, Iowa.
Lbs. No. 1 Cream 22 Test 15. Lbs. Butter fat 330.
Lbs. No. 2 Cream Test Lbs. Butter fat.
Price 35c. Money $—.
Corrections —.
Net amount $1.15.
Payable to L. Lahnbakken.
Fairmont Creamery Co., Sioux City, Iowa.

On Face of Check

The Fairmont Creamery Company

Original Cream Draft

[fol. 73] This draft entered on station report No. —.
No. 368665.

Station Mt. Lake, Minn., Date 6-11-23.

At sight pay to the order of L. Lahnbakken one 15-100, $1.15.

This draft is for cream only. Not good for more than $25.

To Fairmont Creamery Company, Sioux City, Iowa.

(Signed) H. G. Klein, For the Fairmont Creamery Co.

PLAINTIFF'S EXHIBIT "C"

Stub

No. 341460.
Dated 6-11-23.
Shipping Point Sioux City, Iowa.
Lbs. No. 1 Cream 28 Test 22 lbs. butter fat 616.
Lbs. No. 2 Cream, Test — lbs. Butter fat.
Price 38c. Money $—.
Corrections —.
Net amount $2.34.
Payable to L. Lahnbakken.
Fairmont Creamery Company, Sioux City, Iowa.

Face of Check

The Fairmont Creamery Company

Original Cream Draft

This draft entered on Station Report No. —.
No. 341460.

Station Madelia, Minn. Date 6-11-23.

At sight pay to the order of L. Lahnbakken — Two 34-100, $2.34.

This draft is for cream only. Not good for more than [fol. 74] $25.00.

To Fairmont Creamery Company, Sioux City, Iowa.

(Signed) H. P. Strom, For the Fairmont Creamery Company.

In District Court of Cottonwood County

[Title omitted]

Order Denying Motion for New Trial

A motion of a new trial having been made by the defendant, Wilson Borst, and C. A. Flinn, appearing for defendant and O. J. Finstad, appearing for the State in opposition,

It is ordered that the same be and is hereby denied.

Dated July 9th, 1925.

L. S. Nelson, District Judge.

Statement re Bond, etc.

Bond duly approved and filed with the District Court of Cottonwood County July 23rd, 1925.

Bond and notice of appeal served on O. J. Finstad, County Attorney, and Clifford L. Hilton, Attorney General, and proof of such service filed with the Clerk of the District Court of Cottonwood County, July 23rd, 1925.

(Here follow graphs marked side folio pages 74a and 74b)

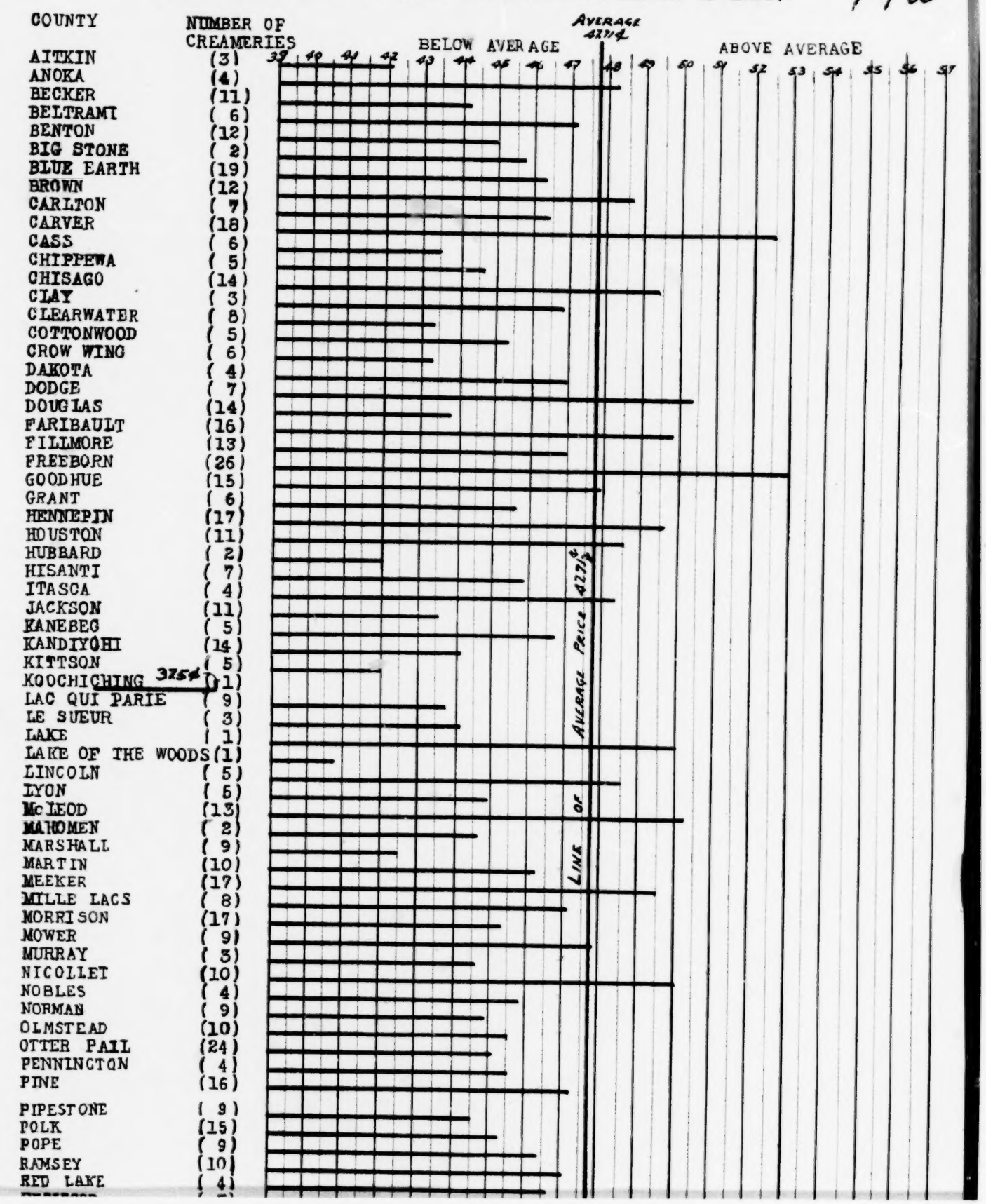
[fol. 75] In District Court of Cottonwood County

Notice and Motion for New Trial

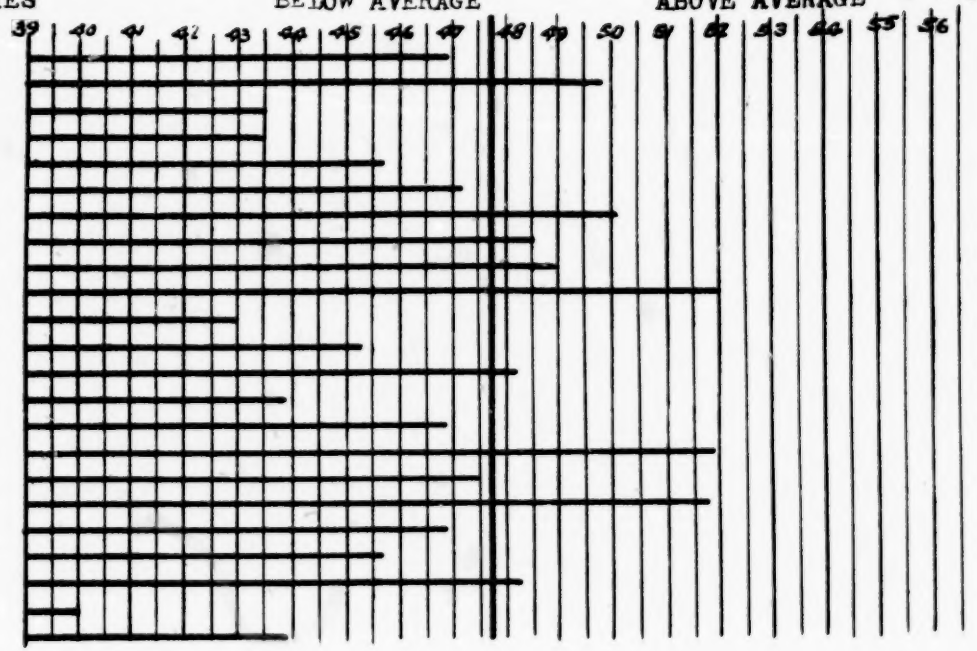
Sirs: You will please take notice, that based on the pleadings, files, records and papers in this action, and on the case to be made and settled herein, at the time of the hearing of this motion, the above named Defendant will move the Court before the Honorable L. S. Nelson, Judge of said District Court, who presided at the trial of said action, at the Court Room in the Court House in the City of Windom, County of Cottonwood, Minnesota, on Monday, the 29th day of June, 1925, at the hour of ten o'clock of said day or as soon thereafter as Counsel can be heard, for an Order setting aside all findings and Orders of the Court, wherein the Court found that the Defendant was guilty as charged

GRAPH SHOWING COUNTIES AND NUMBER OF CREAMERIES PAYING PRICES AT VARIANCE WITH AVERAGE PRICE AND EXTENT OF VARIANCE.
(STATISTICS OF 1923 FROM DAIRY COMMISSIONER'S REPORT OF 1924).

74a



COUNTY	NUMBER OF CREAMERIES
RENVILLE	(11)
RICE	(14)
ROCK	(2)
ROSEAU	(7)
ST. LOUIS	(9)
SCOTT	(6)
SHERBOURNE	(4)
SIBLEY	(12)
STEARNS	(31)
STEELE	(23)
STEVENS	(5)
SWIFT	(7)
TODD	(14)
TRAVERSE	(2)
WABASHA	(10)
WASECA	(11)
WADENA	(7)
WASHINGTON	(5)
WATONWAN	(11)
WILKIN	(2)
WINONA	(21)
WRIGHT	(25)
YELLOW MEDICINE	(6)



in the Complaint and Warrant, and assessed the said Defendant the sum of One Hundred ($100.00) Dollars, and [fol. 76] will ask that the said Findings and Order of the Court so made be set aside, and for a new trial of said action upon the following grounds:

I

That the Court erred in refusing to dismiss the action upon the motion of the Defendant when the case was first called in said Court on the ground and for the reason then assigned, that the information alleges the commission of the offense to have taken place at Madelia, in Watonwan County and not in the County of Cottonwood, where said venue was laid.

II

The Court erred in failing to quash the Complaint and Warrant made by the Defendant at the time of the calling of said case for trial for the reasons:

A. That the statute of Minnesota known as Chapter 120 of the Session Laws of 1923, upon which said information is based, is unconstitutional and void for the reason that it is in violation of the Constitution of the State of Minnesota, which provides that no person shall be deprived of life, liberty or property without due process of law.

B. For the reason that said section of the statute is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property without due process of law.

C. For the reason that said statute is unconsitutional and void for the reason that it violates the provision of the United States Constitution, in the Fourteenth Amend- [fol. 77] ment thereof, providing that no State shall deny to any person within its jurisdiction the equal protection of the law.

D. For the reason that there is no law in the State of Minnesota which makes unlawful the acts charged in said information and Complaint.

E. For the reason that the said statute is unconstitutional and void since it places an unreasonable burden upon and interference with Interstate Commerce.

F. For the reason that the said statute is unconstitutional and void as in violation of the commerce clause of the Constitution of the United States, Article 1, Section 8, Clause 3, providing that Congress shall have power to regulate commerce between the States.

G. For the reason that the said statute is in conflict with the statutes of the United States regulating and governing Interstate Commerce between the States.

H. For the reason that the facts set forth in the Complaint and warrant are insufficient under the laws of the State of Minnesota to constitute an offense.

III

The Court erred in denying the Defendant's motion to dismiss the action and discharge the Defendant for the reason that Section 1 of Chapter 120 of the Laws of 1923 is unconstitutional. Said Section 1 reads as follows:

"Any person, firm, co-partnership or corporation engaged in the business of buying milk, cream or butterfat for manufacture, or for sale of such milk, cream or butter-[fol. 78] fat, who shall discriminate between different sections, localities, communities or cites of this State, by purchasing said commodities at a higher price or rate in one locality than is paid for the same commodities by said person, firm, co-partnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture, or locality of sale of such milk, cream or butterfat, shall be deemed guilty of unfair discrimination and upon conviction thereof, shall be punished by fine not exceeding One Hundred ($100.00) Dollars, or by imprisonment in the County Jail for not exceeding ninety (90) days."

IV

The Court erred in denying Defendant's motion to dismiss the action and discharge the Defendant at the close

of the Plaintiff's evidence, and when the Plaintiff rested its case.

V

The Court erred in overruling the Defendant's motion to the following question asked by the plaintiff of Witness L. Lohnbakken:

Q. Do you know whether or not these stations at this time were buying cream with butterfat ranging from 14 per cent up to 20 and 23 per cent?

Also overruling objection to the following question asked of the same witness:

Q. What is the customary way of shipping cream from these stations?

The Court erred in overruling Defendant's objection to [fol. 79] the following questions asked of witness, L. R. Runke:

Q. Do you know whether these stations commonly buy butterfat containing less than 14 per cent or buy cream containing less than 14 per cent of butterfat?

Q. Is there any appreciable difference, Mr. Runke, in the percentage of butterfat in the shipments made out from these points?

Q. Do you know whether the Fairmont Creamery Company in June, 1923, paid any different price for low test cream than they did for high test cream, based upon the butterfat percentage?

The Court erred in sustaining the objections of the Plaintiff to the following questions asked and offers made to prove evidence of the Witness, A. D. Bland:

Q. Now, in the different cities and different towns in the Southern half of Minnesota, where you have been buying cream for the last nine years, what can you say with reference to their being a variation in price at different places?

Also the Court erred in sustaining the objection made by the Plaintiff to the following offer to prove made by the Defendant:

We offer to prove by this witness that during the last nine years, the prices paid for butterfat in the Southern

half of Minnesota at the different towns has varied in each town, that the variation has been from one cent to eight cents; that such price is exclusive of transportation charges; that such variation is the normal condition of the market in the sale of cream and butter fat, and is the result, en- [fol. 80] tirely, of competitive conditions; that in certain localities there are many more competitors than there are in others; that the quality of cream differs in different localities; that the equipment and efficiency of creameries in the various localities differ, and that each of these things enters into the price that is paid for the butter fat in the particular locality where the sale is made, and that this variation in price, in each town, in the southern half of Minnesota, existed on the eleventh day of June, 1923, and that such variation is constant, and has existed for nine years previous to that time, and that these variations in price are due entirely to the economic conditions in each locality, and to competition.

The Court erred in sustaining objection of the Plaintiff to the following questions and offer to prove:

Q. What was the price on that day that was being paid by all the dealers at Madelia?

We offer to prove by witness that on the date in question, June 11, 1923, each of the dealers at Madelia was paying 38c. a pound for butter fat, the same price at which the Defendant, Fairmont Creamery Company purchased cream in this particular instance.

Q. Where was the territory from which they bought most of their cream?

We offer to prove by witness that the territory from which these two towns purchased most of their butter fat lays between the two towns; that the territory lying between the two towns was a large producer of cream and that there were many competitors in the territory purchas- [fol. 81] ing cream?

Q. Do you know whether or not any of the creameries or dealers at Lake Crystal sent out trucks into the country toward Madelia in order to buy cream?

Offer to prove:

The Defendant offers to prove by the witness that dealers at Lake Crystal sent their trucks out into territory towards the town of Madelia in order to pick up cream at the farmers' doors and that the competition between the purchasers at these two points was keen.

Q. Now how were the roads between Lake Crystal and Madelia?

The Defendant offers to prove by this witness that the roads for automobile travel were in fine condition between these two towns, and that the railroad facilities were easily adequate to allow either town to reach into the territory of the other and purchase cream.

Q. What was the effect of this situation on the price of butter fat at Madelia?

We offer to prove by this witness that the effect of this condition was to raise the price paid for butter fat at Madelia to thirty-eight cents and that thirty-eight cents was the price fixed by competition between these various buyers.

Q. Will you explain how this did effect the price, how the price came to be thirty-eight cents?

We offer to prove by this witness that the Farmers' Co-operative Creamery Company at Lake Crystal began paying the price of thirty-eight cents, and going out into the territory towards Madelia and picking up cream, and that [fol. 82] the buyers at Madelia raised their price to thirty-eight cents, in order to hold to themselves the purchase of the cream which they had been getting in that territory.

Q. This then was to prevent the buyers at Lake Crystal from taking away from the buyers at Madelia all their patronage, was it not?

We offer to prove by this witness that the buyers at Madelia made the price, fixed by the dealers of Lake Crystal, in order to prevent the dealers of Lake Crystal from taking away from the dealers at Madelia their patronage and business which they theretofore enjoyed and had.

Q. You may state whether or not the Fairmont Creamery Company paid thirty-eight cents after their Farmers' Co-operative Company and the dealers at Lake Crystal began paying that rate in order that the Fairmont Creamery Company could hold to itself the business which it had theretofore enjoyed?

Q. What can you say with reference to competition at Bingham Lake for the purchase of butterfat?

We offer to prove by this witness that there were only two concerns purchasing butterfat at Bingham Lake, and that neither of these concerns had raised the price from thirty-five cents.

Q. Did the Fairmont Creamery Company pay the price that it found being paid at Bingham Lake?

We offer to prove by this witness that the Fairmont Creamery Company simply paid the price which they found [fol. 83] being paid for butter fat at Bingham Lake.

Q. What price did the Co-operative Creamery pay on June 11th, 1923?

We offer to prove by this witness that the Co-operative Creamery Company at Mountain Lake was paying on this day thirty-five cents a pound for butter fat.

Q. Has the management of the Farmers' Co-operative Company at Lake Crystal changed hands since the date of this sale?

We offer to prove by this witness that the Farmers' Co operative Company at Lake Crystal has changed hands since the date of the sale of butter fat in this instance.

Q. And you may state whether or not the new management lowered the price of butter fat at Lake Crystal?

We offer to prove by this witness that when the management of the Farmers' Co-operative Company at Lake Crystal changed hands that it no longer paid the price of thirty-eight cents for cream, and that the price of cream at that place and at Madelia was lowered.

The Court erred in sustaining the objection on the part of the State to the following questions asked by the Defendant of witness Mr. Bland on re-direct examination:

Q. And what were those prices paid at the various places in Minnesota?

Q. What is the price that you sent out? The price that is fixed by the butter market?

[fol. 84] The Court erred in sustaining the objection of the Plaintiff to the following offer to prove by witness Bland:

We offer to show by this witness that the Defendant, Fairmont Creamery Company, sends out a price based upon the New York butter market, which is commonly used as a basis of price for the payment of butter fat, and that the defendant Fairmont Creamery Company does not pay more than this price at any locality except where some other dealer pays a higher price; that the Fairmont Creamery Company is compelled to meet the price in order to protect its business which it has been enjoying there.

The Court erred in sustaining objections of the Plaintiff to the following questions and offer to prove on the part of the Defendant of witness J. J. Farrell:

Q. What can you say with reference to whether or not that price varies with each town and locality in the State?

Offer

We offer to prove by this witness that the price paid for butter fat varies in each town and locality of the State, and has so varied for the last thirty years, and that such condition is a normal condition brought about by competition, by the quality of the cream found in the locality and by the nature of the local competitors.

Q. And how much would you say that variation would range?

We offer to prove by this witness that the price varies from one cent to eight cents or nine cents in the different localities and towns and cities in the State, and that such [fol. 85] price is exclusive of transportation charges, and that such range of prices or variation has been a fact, has been constant for the last thirty years, and that it is a normal condition brought about by competition, quality

of the cream purchased at these localities, and the nature, ability and efficiency of the local competitors.

Q. What would be the result, Mr. Farrell, if a level price could be fixed in the State at the prices which are the highest prices being paid?

We offer to prove by this witness that if any level of prices was fixed either at the top of the prices which are customarily paid, or at any other level, that a great many creameries which are purchasing butter fat and are not paying the price now and have not been paying the price which would be as high as that level of price would be compelled to go out of business.

Q. Now what can you say with regard to many of these creameries, with respect to their ability to pay higher prices than they have been paying in those localities?

Proof

We offer to prove by this witness that a vast number of the creameries which are buying butter fat could not afford to pay and could not pay a higher price than the price which they have been paying in the locality where they operate without destroying their own business and causing their own business to be unprofitable.

The Court erred in sustaining objections made on the part of the Plaintiff to the following questions and offers [fol. 86] to prove on the part of the Plaintiff by the witness, M. S. Hartmann:

In sustaining State's objection to Defendant's Exhibit No. 1.

We offer in evidence those portions of Defendant's Exhibit No. 1 and the explanation of the exhibit as follows:

That under the word County are the names of the counties in the State of Minnesota; that under the word Co-Op. in the column are the number of co-operative creamery companies operating in that county; under the name Independent the number of independent creameries operating in that particular county; and under the name Cent the number of centralized creameries operating in that particular county shown; under the column Average

Test Cream is the average test for the year in that particular county of the cream purchased in that county for the entire year; that under the column entitled Average Price Paid per Pound for Butter Fat is indicated the price paid in that particular county, which price is the average normal price paid in that county for the year 1923, exclusive of transportation charges.

We offer Defendant's Exhibit No. 2 in evidence with the explanation that under the word County is given the name of the county shown by the Commissioner's report Defendant's Exhibit No. 1; under the column Number of Creameries is shown the number of creameries doing business in the county as shown by Defendant's Exhibit No. 1 and the line marked Average Line 47.71 cents is the average price paid over the state for butter fat during the year [fol. 87] 1923, as shown by Defendant's Exhibit No. 1, and by the Dairy Commissioner's report; and each of the lines shown opposite the name of the county indicates the point and price which is the average price averaged from all the purchases made in the particular county named, of butter fat, which was purchased in the county during the entire year of 1923, the exhibit indicating the different level of prices paid in each of the counties of the state during the year 1923.

Q. Mr. Hartmann, what enters into the matter of determination of prices paid for butter fat in the different localities in the State of Minnesota at the present time?

We offer to prove by this witness that the price of butter fat is determined by competition and by the local conditions in each of the counties.

We offer to prove by the witness that the price of butter fat did on the day in question and has for years previous to the day varied from one to eight cents in the different towns and localities in the state and that such price is exclusive of transportation charges.

The Court erred in sustaining the objections made on the part of the Plaintiff to questions asked on the part of Defendant of witness, A. D. Bland, and also to offers made to prove certain facts by said witness as follows:

Q. Mr. Bland, you may state how the price has varied during your experience with the creamery business in the State of Minnesota in the different localities where you have had observations?

We offer to prove by this witness that the variation in price existed on the day in question, and that such varia-[fol. 88] tion was constant for nine years previous thereto; and that such variation was from one cent to eight cents in the different localities, and such variation was exclusive of transportation charges.

V

The Court erred in denying Defendant's motion to dismiss the action and discharge the Defendant when the evidence was all closed and submitted to the Court.

VI

The Court erred upon the close of all the evidence and upon the submission of the same to the Court, in finding the Defendant guilty and assessing a fine against the Defendant of the sum of One Hundred ($100.00) Dollars on the grounds that there was no evidence or law upon which to base any fine or conviction.

VII

The Court erred in finding the Defendant guilty and in asserting a fine of One Hundred ($100.00) Dollars on the ground that the law upon which the Court found that the said Defendant was guilty was unconstitutional and void, and that there was no evidence in said case or record upon which the Court could pass a conviction and fine.

That such conviction and fine as so imposed by the Court was contrary to the laws of the State of Minnesota, and the Constitution of said State and the Constitution of the United States, and that said Defendant should have been discharged.

All of which is respectfully submitted.

[fols. 89 & 90] Harris & Flansburg, Lincoln, Nebraska; M. S. Hartman, Omaha, Nebraska; Wilson Borst & C. H. Flinn, Windom, Minnesota, Attorneys for Defendant.

[fol. 91] In District Court of Cottonwood County

State of Minnesota, Plaintiff,

vs.

Fairmont Creamery Company, Defendant

Transcript of Judgment

Pursuant to an order of court heretofore duly made and entered in this cause it is determined and adjudged that the order of the court below, herein appealed from, to-wit, of the District Court within and for the county of Cottonwood be and the same hereby is in all thing affirmed.

Dated and signed Sept. 17, A. D. 1926.

By the Court.

Attest:

Grace F. Kaercher, Clerk.

[fol. 92] Clerk's certificate to foregoing paper omitted in printing.

In District Court of Cottonwood County

Mandate

State of Minnesota, ss:

Supreme Court

The State of Minnesota to the Honorable Judge and officers of the District Court within and for the county of Cottonwood, Greeting:

Whereas, lately in your court, in an action therein pending, entitled, State of Minnesota, plaintiff, and Fairmont Creamery Company, defendant, a certain order was entered therein July 9th, 1925, from which action of your court an appeal thereafter was taken to this court;

And whereas, the said cause came on to be heard before our Supreme Court, and was argued by counsel;

On consideration whereof, it is now here ordered and [fol. 93] adjudged by this court that the order of the court

below herein appealed from, be, and the same hereby is, in all things affirmed and that judgment be entered accordingly. A copy of the entry of judgment thereupon in this court is herewith transmitted and made part of this remittitur.

Now, therefore, this mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your court for such other or further record and proceedings as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, the Honorable Samuel B. Wilson, chief justice of the Supreme Court aforesaid, and the seal of said court at St. Paul, this 17th day of September, 1926.

Grace F. Kaercher, Clerk of the Supreme Court, by Peter O. Scow, Deputy. (Seal of the Supreme Court.)

In District Court of Cottonwood County

Judgment

The above entitled matter came duly on to be tried before the court on the 1st day of June, 1925, without a jury. Charles E. Phillips and O. J. Finstad appeared as attorneys for the State. Messrs. Hainer & Flansburg, M. S. Hartman, Borst & Flinn, appeared as attorneys for the [fol. 94] defendant. The testimony and evidence in said cause was reduced to writing by G. Fred Carson, court reporter. After hearing all of the evidence, the court found:

That the defendant is guilty as charged in the complaint and warrant and as punishment therefor it is adjudged and ordered that the defendant pay a fine of one hundred ($100.00) dollars. A stay of 20 days was granted.

And judgment is hereby entered, that the defendant, Fairmont Creamery Company, suffer and pay a fine of one hundred ($100.00) dollars.

Dated this 22nd day of September, A. D. 1926.

M. B. Severson, Clerk of District Court, Cottonwood Co., Minn. (Seal.)

In District Court of Cottonwood County

Order of Stay

On the application of the defendant, the State not objecting thereto, it is ordered that all proceedings on the part of the State be and the same are hereby stayed until the 30th day of October, 1926.

Dated the 9th day of October, 1926.

L. S. Nelson, District Judge.

In District Court of Cottonwood County

Notice of Appeal

To O. J. Finstad, county attorney of Cottonwood county, and Clifford L. Hilton, attorney general of said state, [fol. 95] and M. B. Severson, clerk of the District Court of Cottonwood County:

Please take notice, that the above named defendant appeals to the Supreme Court of the State of Minnesota, from the judgment of said District Court entered in said proceeding on the 22nd of September, 1926, finding the defendant guilty as charged in the complaint and ordering the defendant to pay a fine of one hundred dollars ($100.00), and the defendant appeals from the whole thereof.

Dated October 26, 1926.

The Fairmont Creamery Company, by Hainer, Flansburg & Lee, Its Attorneys.

I hereby acknowledge service upon me of a copy of this notice of appeal this 26th day of October, 1926.

O. J. Finstad, County Attorney of Cottonwood County. M. B. Severson, Clerk of District Court, Cottonwood County, Minn., by Anna E. Severson, Deputy.

[fols. 96-97a] Bond on appeal for $500, approved and filed October 26, 1926, omitted in printing.

[fol. 97b] IN SUPREME COURT OF MINNESOTA

APPELLANT'S BRIEF

Index

[fol. 98] Mr. Charles E. Phillips, of the Attorney General's Department, St. Paul, Minnesota; Mr. O. J. Finstad, of Windom, Minnesota, Attorneys for Plaintiff and Respondent.

Mr. E. J. Hainer, of Lincoln, Nebraska; Mr. Leonard A. Flansburg, of Lincoln, Nebraska; Mr. M. S. Hartman, of Omaha, Nebraska; Mr. Wilson Borst, of Windom, Minnesota; Mr. Charles Flinn, of Windom, Minnesota, Attorneys for Defendant and Appellant.

[fol. 99] Nature of the Case

This is a criminal prosecution brought in Cottonwood County against the Fairmont Creamery Company, a Minnesota corporation, on the charge of a violation of section 1, chapter 120, Laws of Minnesota for 1923, General Statutes 1923, Sec. 3907, which is a statute requiring any person purchasing butterfat and dairy products to pay the same price at all places in the state which such person pays at any one place.

A criminal complaint was filed in the justice court and the defendant found guilty of paying a higher price in one locality than in another, and was fined $25.00.

An appeal was taken to the district court, and when the matter came on for trial an objection was made to the jurisdiction of the court on the ground that the venue was

improperly laid, an *an* objection was made to the prosecution of the proceedings on the ground that the statute upon which the prosecution was based was unconstitutional. The district court suspended the proceeding, and under the provisions of the statutes, Minnesota General Statutes 1913, section 9251, and on a finding that the objections made raised questions which were doubtful and of such importance that they should be passed upon by the supreme court, certified the case to the supreme court for determination.

The supreme court, upon an opinion appearing in State [fol. 100] v. Fairmont Creamery Company, 202 N. W. 714 (Minn.), remanded the case to the district court for trial. Upon a return of the case to the district court a jury was waived and evidence was taken, and upon the record made the district court held that the statute, under the facts proven and tendered, was constitutional, and that upon the facts proven and tendered the defendant had established no defense. The court found defendant guilty, imposed a fine of $100.00, and the defendant has appealed.

Assignments of Error

I

The district court erred in holding that the prosecution was properly brought in Cottonwood County, since the statute is aimed at the payment of the higher price, and the higher price in this case was paid in Watonwan County.

II

The district court erred in overruling the motion to quash the information.

III

The district court erred in holding that the statute (Sec. 1, Chap. 120, Session Laws 1923) was not unconstitutional as in violation of the constitution of the State of Minnesota, which provides that no person shall be deprived of life, liberty, or property without due process of law.

[fol. 101]

IV

The district court erred in holding that the statute was not unconstitutional as in violation of the Fourteenth Amendment to the Constitution of the United States, pro-

viding that no state shall deprive any person of life, liberty, or property without due process of law.

V

The district court erred in holding that the statute was not unconstitutional as in violation of the provision of the Fourteenth Amendment of the United States Constitution, providing that no state shall deny to any person within its jurisdiction the equal protection of the law.

VI

The district court erred in holding that the statute was not unconstitutional as in violation of the commerce clause of the Constitution of the United States, article 1, section 8, clause 3, providing that congress shall have power to regulate commerce between the states.

VII

The district court erred in not holding said statute invalid, and in conflict with the statutes of the United States regulating and governing interstate commerce between the states.

VIII

The district court erred in holding that the facts proven and offered in evidence by the defendant did not constitute a defense.

[fol. 102]

IX

The district court erred in excluding the facts and proof tendered by the defendant, and more particularly set forth in the motion for new trial and in the record, and in holding the same to be immaterial as not constituting any defense to the prosecution.

X

The district court erred in holding that under the facts tendered and proven the statute upon which the prosecution was based was constitutional, and in ruling that under such facts tendered and proven that the statute was not in

violation of article 1 of section 6 of the constitution of the state of Minnesota, and of the Fourteenth Amendment to the Constitution of the United States, and of the commerce clause, article 1, section 8, clause 3 of the Constitution of the United States.

Statement of the Case

The statute upon which the prosecution is based is section 1 of chapter 120 of the Laws of 1923, (General Statutes 1923, Sec. 3907), and is as follows:

"Any person, firm, co-partnership or corporation engaged in the business of buying milk, cream or butterfat for manufacture or for sale of such milk, cream or butterfat, who shall discriminate between different sections, [fol. 103] localities, communities or cities of this state, by purchasing said commodities at a higher price or rate in one locality than is paid for the same commodities by said person, firm, co-partnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture, or locality of sale of such milk, cream or butterfat, shall be deemed guilty of unfair discrimination and upon conviction thereof, shall be punished by fine not exceeding One Hundred Dollars ($100.00), or by imprisonment in the County Jail for not exceeding ninety (90) days."

This statute repealed a former statute—section 305 of the Laws of Minnesota for 1921.

In a comparison of these two statutes it is seen that the former, the 1921 statute, which had been the law in Minnesota for a long period of years, was in the usual form and contained the provisions regularly found throughout the United States in such statutes. It declared unlawful the purchase of commodities at one price in one locality and at a higher price in another locality when such higher price was paid "for the purpose of creating a manopoly, or to restrain trade, or to prevent or limit competition, or to destroy the business of a competitor."

The present statute, the one upon which the prosecution is based, makes it unlawful for any company or person to

purchase the commodity specified at one price in one [fol. 104] locality and then pay a higher price at the same time in another locality, regardless of the purpose or circumstance under which such higher price was paid. The provision of the former law covering the element of wrongful purpose, which we have just above quoted, was entirely omitted from the present law.

The complaint filed in this proceeding sets forth that the Fairmont Creamery Company, a corporation organized under the Minnesota laws, purchased butterfat at three different towns—at Mountain Lake and Bingham Lake, in Cottonwood County, and at Madelia, in Watonwan County—and declares that said butterfat "was purchased for shipment and was shipped to Sioux City, Iowa, for manufacture and sale thereat," and that the cost of transportation of said butterfat from the points where purchased to Sioux City, Iowa, did not account for the higher price paid at Madelia.

The complaint does not allege that the higher price paid at Madelia was for any wrongful purpose—that is, of creating a monopoly, or restraining trade, or destroying or injuring the business of a competitor. The statute under which the prosecution is based did not expressly make that an element of the offense.

The circumstances under which these prices were paid, what caused the difference in price, what were the condi- [fol. 105] tions which made the difference, and who brought those conditions about, the complaint does not set forth.

Statement of Facts

When this case was formerly presented to the supreme court, upon the abstract questions certified by the district court, the facts in the case had not been developed. No trial had been had. The case now is presented upon specific facts, some of which were admitted in evidence, and some of which were offered by competent witnesses, but which the court held would not constitute a defense even though proven, and would be immaterial upon the question of the constitutionality of the statute.

The towns of Bingham Lake, Mountain Lake, and Madelia are situated upon one line of railroad, connecting them

with Sioux City. Bingham Lake is the closer to Sioux City, and ten miles east of that is Mountain Lake, and thirty-four miles east is Madelia. Bingham Lake and Mountain Lake are in Cottonwood County, and Madelia is in Watonwan County.

On June 11, 1923, the state dairy inspector, specially deputized for the occasion, sold cream to the Fairmont Creamery Company at Bingham Lake and at Mountain Lake which tested 14 and 15 per cent of butterfat, and at the price of 35 cents per pound of butterfat at each town, and on the same day sold cream to the Fairmont Cream- [fol. 106] ery Company at the town of Madelia, which cream tested 20 per cent of butterfat, and the price at Madelia which was paid by the Fairmont Creamery Company was 38 cents. It is claimed that the Fairmont Creamery Company, by the payment of the price of 38 cents at Madelia, discriminated against the town of Bingham Lake and Mountain Lake, where the price of 35 cents was paid. The state proved no more than to show these prices, and rested its case.

The defendant offered as a defense to prove the following facts, some of which were admitted in evidence, and some were refused admission by the court. The facts, however, offered or proven, stand admitted for the purpose of the suit, the court having held only that they were immaterial.

At Mountain Lake and Bingham Lake the conditions governing the price of cream were practically the same, the butterfat content of the cream was the same, and the conditions as to competition were alike. There were few buyers at these two stations. At Madelia, however, the situation was entirely different. At that town there were two creameries operating, one, the Worthington Creamery Company, owned by an individual concern, and the other, the Farmers Co-Operative Creamery Company. There were also, besides these two creameries, the Fairmont Packing Company, a concern in no way connected with the de- [fol. 107] fendant, and the Madelia Produce Company, as well as the defendant, the Fairmont Creamery Company, which had buying stations located at Madelia. There was also located not far from Madelia the town of Lake Crystal,

and this town had creameries, among which was a farmers' co-operative creamery, and a number of buying stations operated by different individuals. Between the town of Madelia and the town of Lake Crystal was a territory which was an abundant producer of cream, and reached by roads in fine condition, and Madelia and Lake Crystal competed with each other keenly in the purchase of cream from that intermediate territory.

Proof was offered to show that the Farmers Co-operative Creamery Company at Lake Crystal sent its trucks and wagons out into this territory and into the territory near Madelia and picked up cream at the farmer's door, not requiring the farmer to carry the cream to market at Lake Crystal. This company also paid 38 cents a pound for butterfat. The creameries and buying stations at Lake Crystal met the price of the Farmers Co-Operative at that place and also paid 38 cents, and at Madelia the creameries and buying stations paid 38 cents to the farmers in this territory, in order to meet the price which was being paid at Lake Crystal, which price was initiated by the Farmers Co-Operative Creamery Company there. The Fairmont Creamery Company paid the price of 38 cents only after [fol. 108] it had been established in the manner as above stated. Had the creameries and buyers at Madelia not met this price of 38 cents, they would have been unable to purchase cream and would have lost the patronage which they had established in this territory and which they had theretofore enjoyed.

It also appears that the butterfat content of the cream purchased at Bingham Lake and Mountain Lake was not the same as that of the cream purchased at Madelia. At Bingham Lake and Mountain Lake the content was 14 and 15 per cent, while at Madelia it was 20 per cent. Transportation rates on cream are so much a can, regardless of butterfat content. Where cream is rich in butterfat it is evident that more cream may be shipped to market in a can for a given price than where the cream is low in butterfat content. A company therefore can afford to pay more when the cream is rich in butterfat content than it can when the cream is of a lower butterfat content. In this case it would appear that the difference in butterfat content would justify a difference in price between Madelia

and the towns of Mountain Lake and Bingham Lake of somewhere near 1 cent. Though this would not justify the entire difference in price paid between these different towns, it would justify to some extent a portion of the difference.

The higher price paid at Madelia was brought about by [fol. 109] reason of the entire general situation above described. The trial court held that this did justify the defendant in paying a higher price and did not constitute a defense.

Proof was further offered to show that the Farmers Co-operative Creamery Company at Lake Crystal changed hands shortly after the date in question, and that it began paying a lower price, and that the prices at Madelia were lowered in consequence of the lowering in price at Lake Crystal.

The testimony of Mr. Bland, superintendent of the Fairmont Creamery Company, was offered to show that in the southern part of Minnesota, where the Fairmont Creamery Company was purchasing cream, there were 300 farmers co-operative creamery companies and local independent companies also purchasing cream, and that there were in this district 1,000 cream-buying stations owned by the several companies doing business there.

Mr. Bland, it appeared, had been in the creamery business for many years, and for the last nine years had been superintending the business of the defendant in the southern part of Minnesota, and his testimony was offered to show that the price paid for cream in the different towns and cities in this district has varied in each town; that the variation has been from 1 cent to 8 cents; that such price is exclusive of and has no relation to transportation [fol. 110] charges; that such variation is the normal condition of the market in the sale of cream and butterfat, and is the result entirely of competitive conditions; that in certain localities there are many more competitors than there are in others; that the quality of cream differs in different localities; that the equipment and efficiency of creameries in the various localities differ, and that each of these things enters into the price that is paid for the butterfat in the particular locality where the sale is made, and that this variation in price, in each town, in the southern half

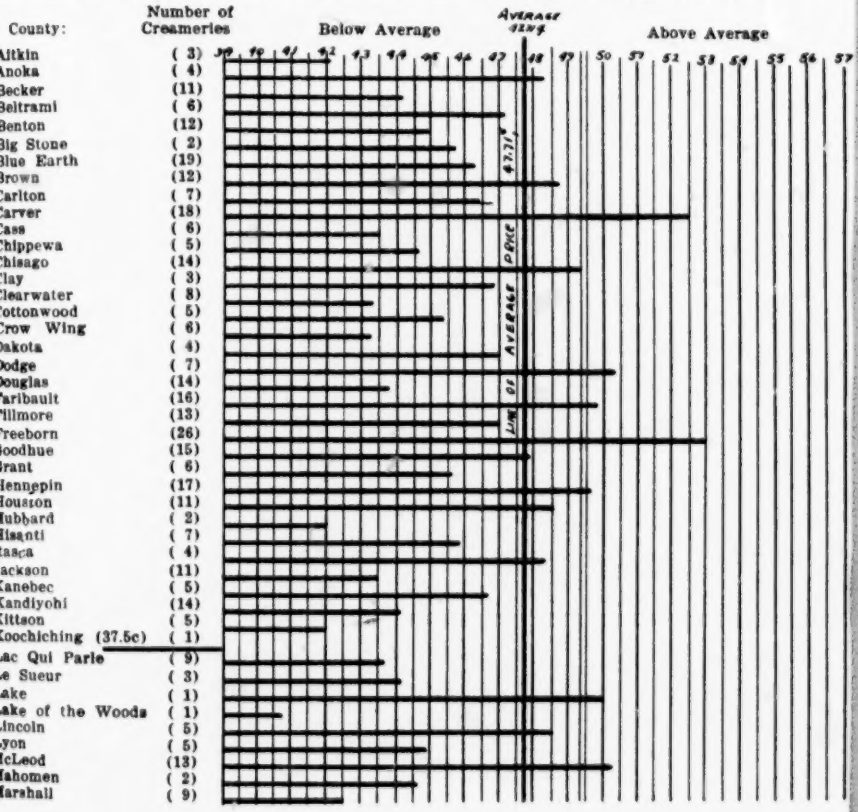
of Minnesota, existed on the 11th day of June, 1923, and that the fact of variation is constant, and has existed for nine years previous to that time, and that these variations in price are due entirely to the economic conditions in each locality, and to competition.

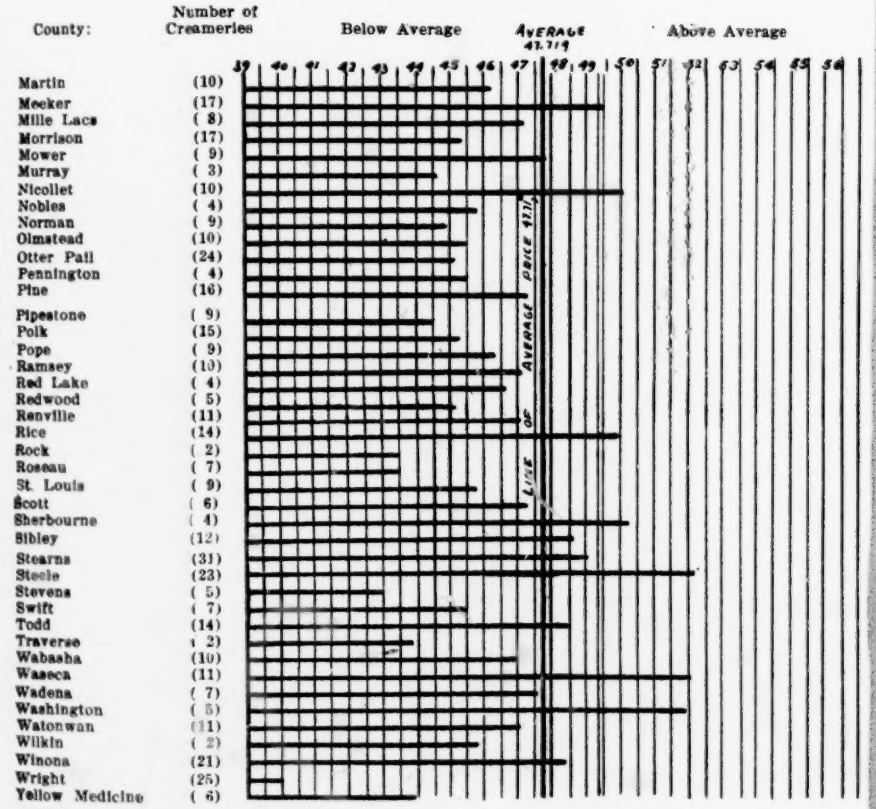
The testimony of Mr. Farrell, secretary of the Dairy Products Association of the Northwest, covering a district in which the state of Minnesota is included, was also offered. It appeared that he had operated creameries for twenty-two years in Minnesota, and that since 1918 he had been connected with the Dairy Products Association. The testimony offered by him was that there were, in 1923, 839 creameries in operation in Minnesota, and that in 1924 there were 841; that of these 839 companies, 170 were independents, and what are known as centralized creameries, and that the balance, 660, were farmers co-operative [fol. 111] creamery companies, which were local concerns not associated the one with the other, and that these farmers co-operative companies, in their several activities taken altogether, reached into all the places in the state in their purchases of cream.

His testimony was also offered to show that the price for cream in the various towns and cities of the state varied from 1 to 8 or 9 cents in the different localities, towns, and cities, and that such variation in prices were exclusive of and bore no relation to transportation charges, and that such range of prices or variation has been a fact which has been constant in the state for the last thirty years, and that such range and variation in price in the different localities is the normal condition of the price paid for cream, brought about by competition, quality of the cream purchased at these localities, and the natural ability and efficiency of local competitors. His testimony was also offered to show that in these localities the local competitors were paying for cream all that they could afford, and that if the price were by any possibility raised over the state so that it would be level, the local creameries operating in all those towns and cities, which were accustomed to pay a smaller price than such established level price, would be unable to continue in business.

A portion of the official report of the commissioner of the state dairy and food department, of the state of Minne-

Graph showing counties and number of creameries paying prices at variance with average price and extent of variance. (Statistics of 1923 from Dairy Commissioner's Report of 1924.)




County:
Number of Creameries
Below Average
AVERAGE 47.719
Above Average
39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56
AVERAGE PRICE 47.719 OR LESS
Martin (10)
Meeker (17)
Mille Lacs (8)
Morrison (17)
Mower (9)
Murray (3)
Nicollet (10)
Nobles (4)
Norman (9)
Olmstead (10)
Otter Tail (24)
Pennington (4)
Pine (16)
Pipestone (9)
Polk (15)
Pope (9)
Ramsey (10)
Red Lake (4)
Redwood (5)
Renville (11)
Rice (14)
Rock (2)
Roseau (7)
St. Louis (9)
Scott (6)
Sherbourne (4)
Sibley (12)
Stearns (31)
Steele (23)
Stevens (5)
Swift (7)
Todd (14)
Traverse (2)
Wabasha (10)
Waseca (11)
Wadena (7)
Washington (5)
Watonwan (11)
Wilkin (2)
Winona (21)
Wright (25)
Yellow Medicine (6)

[fol. 112] sota, for the year 1924 (Exhibit No. 1), was offered in evidence, so far as it pertained particularly to creamery business done in the year 1923.

Based upon the facts and data furnished by this report is a graphic illustration indicating the average variation in price in the different towns and cities in the state of Minnesota for the year 1923 (blue print Exhibit No. 2 attached to the record).

It appears by the report of the commissioner of the state dairy and food department that the average price paid for cream during the year 1923, in all counties in the state, was 47.71 cents. There were only a few counties, if any, however, which paid that exact average price, each individual county either falling below or rising above that average. The range in prices as shown by this report was from 37½ cents, the average price paid in Koochiching County, to 53 cents, paid in Freeborn County, and the prices paid at the various other cities and towns in the state range in between these two limits. Such a variation in price, shown for the year 1923, is a normal condition, and one which has always existed in the cream business. The graphic illustration of the facts set forth in the dairy commissioner's report, and introduced as Exhibit No. 2, follows:

(Here follows graph marked side folio pages 113 and 114)

[fol. 115] Argument

I

The statute is an arbitrary and unreasonable infringement of personal and property rights and an unwarranted and oppressive interference with liberty of contract, and is in violation of article 1, section 6, of the Constitution of Minnesota, and is in violation of the Fourteenth Amendment to the Constitution of the United States.

State v. Drayton, 82 Neb. 254 (1908), 117 N. W. 768, 25 L. R. A. (N. S.) 1287, and note.

State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496.

State v. Central Lumber Co., 24 S. D. 136, 123 N. W. 504, 42 L. R. A. (N. S.) 804; affirmed 226 U. S. 157.

Niagara Fire Ins. Co. v. Cornell, 110 Fed. 816.
McFarland v. American Sugar Refining Co., 241 U. S. 78, 60 L. Ed. 899.
Williams v. Evans, 139 Minn. 32, 165 N. W. 495.
Lawton v. Steele, 152 U. S. 133.
Adkins v. Children's Hospital, 261 U. S. 525, 67 L. Ed. 785.
Coppage v. United States, 236 U. S. 1.
Commonwealth v. Boston Transcript Co., 144 N. E. 400 (Mass.).

[fol. 116] Wolff Packing Co. vs. Court of Industrial Relations, 262 U. S. 522, 67 L. Ed. 1103.

It is apparent from the foregoing statement of facts that the normal condition of the market governing the price of cream is that prices differ in the various localities of the state, and the reason for this difference is obvious. The specific instance, upon which the prosecution is based, premised upon the difference in price between the towns of Madelia and Mountain Lake and Bingham Lake, is a good illustration of normal operation.

The company purchasing at different localities in the state cannot purchase at its own prices. It must pay the prices which are found to exist there. The effect of the statute, therefore, is to exclude companies from purchasing where it finds a market, which would be few and rare indeed, where it could purchase on the exact and identical price.

It would be impossible for a purchaser dealing throughout the state to meet the competition in the multitude of localities in the state of Minnesota by fixing a flat level price at which it would buy. The defendant and other such purchasers have no control over the prices at which such commodities can be purchased in the state of Minnesota, and cannot establish level prices even by concerting and agreeing among themselves in an attempt to do so. A level price could only be established, if such a law would be valid, by a law fixing specific prices binding upon all purchasers [fol. 117] of cream, whether doing business in one locality only or doing a business in several localities.

By reason of competition and local conditions the price to be paid for butterfat varies and always will vary, but,

entirely aside from that proposition, assuming, for the sake of argument, that a level price could be paid, say 35 cents per pound for butterfat, and that no one should pay more nor less than 35 cents, still it would be absolutely impossible for a company to purchase at different localities in the state. If all companies were purchasing in the state and shipping to one place, say that were all shipping to Sioux City, then transportation charges would be identical and a 35 cent rate for butterfat could be put in force, and the rate would be 35 cents all over the state, adding to it the cost of transportation. However, it must be remembered that all companies do not ship to Sioux City. In fact, only one company, the defendant, does. Some companies ship to St. Paul and Minneapolis, some to other towns in the state of Minnesota, and many to towns outside the state of Minnesota, and the independents and some 660 farmers co-operative creamery companies, which completely cover the purchasing territory in the state, do not ship at all.

As an illustration let us take two companies located 100 miles apart, purchasing cream from the territory lying be- [fol. 118] tween these two points. Assume that the cost of transportation per pound of butterfat for 25 miles is 1 cent, for 50 miles is 2 cents, and for 75 miles is 3 cents, and that these companies start out on a basis of each paying the same net price for cream, exclusive of transportation.

It is apparent then that these companies can pay say 36 cents for cream at a 25-mile distance, 35 cents for cream at a 50-mile distance, and 34 cents for cream at a 75-mile distance. At the point equidistant between these two companies, each company can pay 35 cents on this basis. However, at the point which is 25 miles from one company and 75 miles from the other, in order to be consistent with the 50-mile point, one company can pay 34 cents only, while the other company can pay 36 cents. The company paying 36 cents gets the business. The other company cannot meet that price, for that price at that point would be out of line with the price which it is paying at a point 50 miles distant.

In other words, different companies purchasing cream must not only be permitted to allow for their own trans-

portation cost, but in order to compete with other companies must be able to allow for the transportation costs which the other companies pay. To refuse to allow that absolutely limits the rights of companies to purchase except at very few places. The inevitable effect of the statute is to restrict to local buying.

It is impossible for companies buying at different places to comply with the statute. If these companies could com- [fol. 119] bine and agree upon a set price in the attempt to establish a level price over the state, and make it high enough so that local conditions and competition were entirely overcome, still, by reason of this difficulty in transportation costs, the statute would necessarily limit every company purchasing cream to a small locality, near its destination of shipment, and where its transportation costs were low.

In other words, where two companies are purchasing at one locality, one company is permitted to make a price allowing for its transportation charge, which transportation charge is different from the other companies, and which price therefore cannot be met by the other companies. That condition would be present at every locality in the state. One company or the other, by reason of arbitrary conditions, would be permitted to purchase at certain points, while the other companies would not.

The court in its opinion (State v. Fairmont Creamery Company, 202 N. W. 714, supra), taking judicial notice, gives as the basis for justification of the statute the following reason:

"A centralized creamery, supplied with ample capital and facilities, has the ability and meets the temptation to destroy competition at a buying station by overbidding, absorbing the resultant losses, if any, through the profits of its general business, and, when competition is ended, to buy on a non-competitive basis. If it does all this suc- [fol. 120] cessfully it has a monopoly, and may or may not treat producers justly. The statute seeks to prevent the destruction of competition by forbidding overbidding unless the dealer makes prices at other buying points correspond after proper allowances for the cost of transportation. If the statute is obeyed, destroying competition is expensive."

The argument of the court is that this statute aims at the same evil that the former statute aimed at. That it aims to prevent unfair competition and the establishment of monopolies. The opinion assumes that a large company can control the price, and that by paying different prices it can cause injury. The facts in the case, however, make it evident that a company cannot control the price. It is argued that the company may reduce the price at one place and raise it at another. With co-operative creameries purchasing cream at all points in the state, how can a large creamery purchase cream at less than what the co-operative creameries are offering? It is quite obvious that such could not be done. A company cannot reduce the price below what is reasonable at any point. The payment of one price at one place and one at another, bears no logical relation to unfair competition. As we have shown, it is the normal condition. Competitors can be injured, monopolies can be established, and dealers driven out of business, not by the payment of different prices at different localities, but by the payment of high and unreasonable prices at any or all localities.

[fol. 121] The statute does not aim at the payment of high and unreasonable prices. In that respect it differs from the former law, and the distinction between this law and the former law, we think, the court has lost sight of. It must be remembered that the former law only made it an offense to pay a higher price at one locality than at another, when the higher price injured competitors—when it was to drive others out of business and create a monopoly. Such wrongful objects could, of course, only be attained by the payment of prices unreasonably high. The higher price which was aimed at, therefore, was the kind of a price which works injury—an unreasonably high price. A reasonable price would not have such effect. The former statute was aimed at unreasonable prices. It bore a relation to wrong. It was logically prepared and formed to meet the evil of the payment of high prices which caused injury. The present statute does not aim at high prices. It does not aim at unreasonable prices. It says nothing about monopoly or unfair competition. The court assumes in its opinion that that was the object of the law. Whether this was the object or not, the law itself bears no reasonable relation to

such an evil as the one intended to be prohibited. In its operation the law prevents companies from dealing on the normal market and meeting prices which are found there fixed and established by the natural workings of economic laws. The effect of the court's decision is to say that since centralized creameries have been guilty of overbid-
[fol. 122] ding, of which fact the court takes judicial notice, that centralized creameries may be prohibited absolutely from purchasing at more than one place, since in practical effect that is the result of the operation of the statute. The effect of the operation of this law is to prohibit persons from purchasing at different places, since in order to purchase at different places they must purchase at different prices.

The court in its opinion refers to the case of Booth v. Illinois, 184 U. S. 425, and other cases of similar character. Those cases are clearly distinguishable from the case here. In that case a statute forebade options to sell or buy grain or other property at a future time, though actual delivery was intended. The statute covered all such contracts though some, it is true, would not be gambling contracts. These contracts were prohibited because of their natural tendency towards wrong. The underlying principle of that decision and the other like decisions prohibiting certain callings, as stated in the above cited case, is as follows:

"A calling may not in itself be immoral and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious."

But we do not find that element existing in the present case. The practice of paying different prices at different localities in the state is the normal condition, and does not carry with it any tendency towards that which is immoral
[fol. 123] or pernicious, nor does it bear any relation to wrong. The payment of different prices bears no relation to unfair competition, nor to the creation of monopolies. It is the payment only of unreasonable prices, higher prices than are justified, that is wrong, and the statute in its operation does not aim at nor cover that. If, under the statute, a company should pay an unreasonably high price all over the state, the statute would not be violated, though an un-

reasonable price had been paid and competition injured. On the other hand, if a company meets the conditions of the market and pays the prices found to exist, which vary in every community, it has done no harm to competition and has done the normal and natural thing, but it has violated the statute and committed an offense. In order to do business in different localities in the state without committing wrong, it is essential that a company pay the prices found there, and it necessarily follows that it must pay different prices. The legislature might as well say that all contracts for the sale of land at an increased price over the purchase price should be prohibited, because in some such sales fraud is perpetrated. The sale of lands at an increase of price is the normal thing. Simply because of the fact that in some such sales fraud may be committed would not justify the state in refusing to allow any such sales to be made. Such a statute would be arbitrary and capricious.

So is the statute under consideration, which bears no relation to any wrong or evil, but which arbitrarily and capri- [fol. 124] ciously says to all companies operating in the state that they cannot do the normal thing and purchase at the prices which are found to exist in the several markets of the state.

The statute under consideration differs from all other such statutes—and there is probably an anti-discrimination statute in almost all, if not all, of the states—in that the usual statute contains a provision that where a different price is paid in one locality than in another for the purpose of creating a monopoly or destroying competition then payment of such price shall be unlawful. In each of these statutes the unlawful intent and purpose and the doing of a malicious wrong is the gist of the offense. In the statute under consideration, intent and purpose, or the doing of a wrong, does not enter in. The statute declares that where one price is paid at one place and then a higher price is paid at another, the payment of the higher price is illegal no matter how reasonable nor what the circumstances were which affected the making of the higher price.

In our examination of those cases passing upon the usual statutes, which declare that a discrimination in price be-

tween localities shall be unlawful when done for the purpose of destroying competition or creating a monopoly, we find that the courts have carefully distinguished between those transactions which are made without such a purpose and those transactions which are made with a purpose to do wrong, and it is only by reason of the fact that the pay-[fol. 125] ment of the higher price in one locality is an unreasonably high price and is paid with the purpose of injuring another in his business, or of taking his business from him so as to create a monopoly, that the courts have found justification for upholding such laws as constitutional.

The very first decision to pass upon an anti-discrimination statute is that of State v. Drayton, 82 Neb. 254 (1908), 117 N. W. 768, 23 L. R. A. (N. S.) 1287, and note. The statute in that case provided that any person who shall intentionally, for the purpose of destroying the business of his competitor in any locality, discriminate between different localities by selling (instead of buying) commodities at a lower (instead of higher) rate in one section than in another, shall be guilty of an unlawful act. The court declared the law to be constitutional for the reason that it was aimed at the prevention of monopolies and at unfair competition, and that the intent and purpose with which a sale was made at a lower price at one place than at another was the gist of the offense. The court in the opinion says:

"From a careful reading and study of the act in question, we are driven to the conclusion that it is not subject to attach. * * * It does not seek to prevent any person or corporation from engaging in any lawful business, nor does it prevent legitimate competition, nor seek to interfere in any way with the due management of any one's business, nor prevent the sale of any commodity at any price [fol. 126] which the owner may fix or demand. Indeed, the act recognizes the right of all to engage in the production, manufacture, distribution and sale of any and all commodities in general use. There is a clear recognition in law, in commerce, and in the possession and use of property, that every person has the right to use his own as he sees fit, so long as he does not wrongfully use it in such a way as to interfere with the rights of others. The whole fabric of civilized, social and commercial life, and the enjoyment of

liberty and ownership of property, are based upon compromises and limitations of the use of one's members and the control of his property. The act in question only provides against the use and sale of one's property for the purpose of destroying the business of a competitor. The owner or dealer may sell for any price he may choose, on any terms he may adopt, without reference to what effect his action may have upon the trade or business of others, so long as he does not do so for the purpose named. It may be that by underselling others he may draw trade away from them, or, indeed, the secondary effect may be to compel them to adopt his scale of prices or abandon their business; yet, if his conduct is not for the purpose and with the intention prohibited by the statute, he is violating no law, and no one can legally object to or interfere with his methods. The statute clearly makes the purpose with which the act is done the controlling element of the offense (p. 259).

"It is contended by counsel for defendant that 'the act interferes with freedom of contract,' and is therefore violative of the constitutions of both the federal and state governments. As we have already indicated, we are wholly [fol. 127] unable to see where the previous existing right of the individual to enter into lawful contracts is in the least abridged or impaired. It is not the making of contracts which is forbidden, but the conduct, purpose and motives of the party in connection with his acts which brings him within the prohibitions of the law" (p. 265).

In that case the objection was made by counsel that by the provisions of the law an act which is of itself lawful, that is, the lowering of prices of articles sold may be rendered unlawful by reason of the mind or purpose of the individual accused, and that such mental purpose would be incapable of proof. But to this objection the court answered:

"This is not a question which inheres in the subject before us. The presence or absence of a criminal purpose may or may not be easily ascertained, but with that we now have nothing to do. Each prosecution under the act will have to depend upon its own proved facts. The existence or non-existence of what is known in criminal law as

the criminal mind would be a question for a trial jury under the facts established by the evidence submitted" (p. 266, supra).

This case has been universally followed by other courts in decisions upon similar statutes, and the same reasoning employed, the clear and direct expressions of the courts being that except for the provision in the statutes confining their operation to those acts which are wrongful and [fol. 128] done to create monopoly, or to injury competition, the statutes could not be upheld.

A similar case was decided by the Supreme Court of Minnesota in State v. Bridgeman & Russell Company, 117 Minn. 186, 134 N. W. 496. In that decision the supreme court sustained the constitutionality of the Minnesota statute as it existed before the statute, by the recent amendment was placed in its present form. When that case was decided, the statute describing the offense provided that a discrimination in prices, "when done with the intention of creating a monopoly or destroying the business of a competitor," would constitute an offense. And the Supreme Court of Minnesota, making the same distinction which was expounded in the Nebraska case (supra), sustained the statute, particularly pointing out that:

"The payment relatively of a higher price for milk, cream and butterfat in one locality than in another is not forbidden by our statute, for it is only when such discrimination is made with the intention of creating a monopoly or destroying the business of a competitor that the act is forbidden."

In the further case of State v. Central Lumber Company, 24 S. D. 136, 123 N. W. 504, 42 L. R. A. (N.S.) 804, and affirmed in 226 U. S. 157, involving a statute similar to those discussed in the decisions above cited, the Supreme Court of South Dakota upheld such a statute upon the same [fol. 129] reasons as are set out in the decisions supra, the court in its opinion saying:

"Bear in mind at all times that this law is aimed only at persons who resort to such 'unfair' methods with the 'intent' to destroy the business of their competitors."

The distinction made in these cases and pointed out as a justification for upholding the validity of the statute is a vital one.

Where statutes have been passed similar in their operation to the statute here under consideration, interfering with the right of contract, without regard to the purpose or intent with which such contracts are entered into, and when such contracts are not made and entered into for the purpose of injuring others or for creating a monopoly, they have been declared unconstitutional.

In the case of Niagara Fire Insurance Company v. Cornell, 110 Fed. 816, the federal court declared a Nebraska statute unconstitutional. This statute was the anti-trust statute of 1897. In that statute the legislature had defined many acts to be unlawful, among which were to fix any standard whereby the price to the public shall in any manner be established; to enter into any contract by which a party is not to deal in any article below a certain price, or by which the parties agree to keep the price at any given sum. The court, in referring to this statute in its operation covering insurance contracts, said:

[fol. 130] "But if legislation like this can be sustained, then matters which have been the subject of contract from time immemorial cannot longer be covered by agreements. It cannot be said of this statute that any one material provision may be held void, and allow the balance of the statute to stand and be enforced. * * * If this statute is valid, two men in the same line of business in the same town or village cannot form a partnership if it tends to maintain prices. They must continue, each for himself, until one or the other or both are destroyed. Neither can a stock company nor a corporation be formed by two or more if, by so doing, the prices is maintained. This statute is not a step, but it is a long stride—hundreds of years—backward, when monarchs, cabinet officers, and even parliament decree the price to be paid for a day's labor, and the cost of all the necessaries of life, even to the loaf of bread. * * * If this law is valid, two or more farmers cannot agree that they will not sell their wheat to a neighboring mill for less than so much per bushel. Two or more farmers cannot agree that the livestock feeder shall not

have their corn, only at a certain price. Blacksmiths cannot agree that they will charge so much for shoeing horses. Nothing can be agreed to by the manufacturer, the farmer, the gardener, the contractor, consumer, or laborer to prevent the reduction of price. Can it be possible that such legislation is valid?"

The case of McFarland v. American Sugar Refining Company, 241 U. S. 78, 60 L. Ed. 899, bears directly upon the issue here. That case involved a statute which prohibited the sale of sugar at a lower price in one locality than [fol. 131] in another for the purpose of creating a monopoly or injuring competition. The statute provided that—

"any person engaged in the business of refining sugar within this state who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine."

The evidence in the case showed that the company was paying a less price in Louisiana than it was paying elsewhere, and it was the contention of the prosecution that the mere variation in price made a prima facie case under the statute. It was held, however, that the mere payment of a different price in one locality than in another was not in itself unlawful and did not in itself even indicate that the party paying such prices was intending an injury or a wrong to any person. The court, referring to the provision of the statute just above mentioned, says:

"As to presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 55 L. Ed. 78, 80, 32 L. R. A. [fol. 132] (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912-A 463, 2 N. C. C. A. 243. The presumption created here has no relation in experience to general facts. It has

no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

And the court in the syllabus states it to be the rule that:

"A state cannot, consistently with the equal protection of the laws clause of the United States Constitution (14th Amendment), create * * * a presumption of participation in a forbidden monopoly or combination from the systematic payment in Louisiana by a person engaged in sugar refining within that state of a less price for sugar than he pays in any other state, nor a presumption that the closing or keeping idle of a sugar refinery for more than one year was for the purpose of violating that statute or the laws against monopolies."

The Minnesota statute in the case here under consideration aims at no particular wrong. There is no avowed purpose for the enactment. Though the former law was directed at monopolies and unfair competition, this law has stricken from it that provision; and what was the real purpose of the anactment must be left entirely to conjecture. Any idea in the mind of the legislature that such a law was justified as an exercise of the police power, especially where the purpose in the passage of the law is not disclosed, is of [fol. 133] no aid or persuasive force. In the case of Williams v. Evans, 139 Minn. 32, 165 N. W. 495, the court in this regard says:

"The pertinent part of the Fourteenth Amendment reads:

"'Nor shall any state deprive any person of * * * liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"This guarantees to the citizen liberty of contract, and liberty to conduct his business affairs in his own way. * * *

"The liberty of contract guaranteed by the amendment is not absolute. It is subject to the power of the state to legislate for certain permissible purposes. * * *

"Yet there is a limit to the valid exercise of the police power by the state. It is not enough to merely assert that

the subject relates to the health, peace, morals, education or good order or welfare of the people. 'The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held valid which interferes with the general right of an individual to be free in relation to his own labor.' Lochner v. New York, 198 U. S. 45, 57, 25 Sup. Ct. 539, 543, 49 L. Ed. 937, 3 Ann. Cas. 1133. The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint,' not freedom from reasonable regulation. The real test is whether the limitation is a 'reasonable regulation to safeguard the public interest, imposed, not solely for the benefit [fol. 134] of the individual, but essentially for the common benefit of all. Miller v. Wilson, 236 U. S. 373, 380, 381, 35 Sup. Ct. 342, 49 L. Ed. 628, L. R. A. 1915-F 829."

And in the case of Lawton v. Steele, 152 U. S. 133, the rule is stated that:

"The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its public power is not final or conclusive but is subject to the supervision of the courts."

In the case of Adkins v. Children's Hospital, 261 U. S. 526, 67 L. Ed. 785, the Supreme Court of the United States has recently held that an act of Congress attempting to fix the minimum wage for women was an unreasonable and arbitrary interference with the liberty of contract guaranteed by the Constitution. The court quotes from the case of Coppage v. United States, 236 U. S. 1, as follows:

"Included in the right of personal liberty is the right of private property, and partaking of the nature of each is the right to make contracts for the acquisition of property."

And then the court adds:

"There is, of course, no such thing as an absolute freedom of contract. It is subject to a great variety of re- [fol. 135] straints. But freedom of contract is neverthe-

less the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the exercise of exceptional circumstances."

In the case of Commonwealth v. Boston Transcript Company, 144 N. E. 400 (Mass.), a statute was involved which required any newspaper to publish notices given out by the minimum wage commission covering the fact as to whether certain employers had complied with the recommendations of the commission with regard to wages, and providing that the newspapers should accept and print these notices at a specified rate. The court held that the statute was an unreasonable infringement upon the liberty of contract, and in declaring that a newspaper could not be compelled to print such notices in the manner stated, the court said:

"He may not want to print the designated matter at the rates commonly charged for space. It may not be for his business advantage so to print it. He may not want to print it at any price. His preferences, desires, or financial advantage or detriment are entitled to no consideration under the statute. This class of advertising may be peculiarly onerous. It may be especially disagreeable from a business standpoint. Its fair market value, regarded as space occupied, may be much greater than the price commonly charged for business advertisements of the usual character. Conditions can readily be conceived where these factors would exist. No one of them or others of kindred [fol. 136] nature can be weighed under the terms of the statute."

The legislature had no power to arbitrarily fix rates on the commodities specified in this statute. The business of buying milk, cream, and butterfat is not a business impressed with a public interest. Where property is devoted to a public use, the owner of the property in effect grants to the public an interest in the use; and from that time forward while the property is so used it may be controlled by the public for the common good and its rates and charges regulated. But there is no attempt in this statute to declare that the business brought within the purview of the statute is a public business or is to be treated as such.

In the case of Wolff Packing Company v. Court of Industrial Relations, 262 U. S. 552, 67 L. Ed. 1103, where a statute was enacted for the purpose of regulating the fixing of wages by an industrial court in certain industries, and an attempt was made to fix the scale of wages for the Wolff Packing Company, a company engaged in the packing-house business, the court held that such a business was not impressed with a public interest, and that the law which attempted to fix the wages of employees in such business was an unwarranted and unreasonable infringement upon the right of contract.

The statute here under consideration does not aim to regulate the price paid for milk, cream, and butterfat, so [fol. 137] that such price should not exceed what is reasonable and proper under the circumstances. The statute, in fact, does not go into the matter of the reasonableness of the price paid in any locality. The statute does not take into account the fact that the price will be influenced by local conditions as well as by the quality of the article purchased. In some localities the quality of the cream is better than in others. The condition and flavor of the cream may enter into price. And yet the statute declares that the payment of one price for butterfat at one place and the payment of a higher price for butterfat at another place shall constitute an unlawful act and be punishable as a public offense.

The statute arbitrarily and oppressively restricts and destroys the freedom of markets. The inevitable consequence is the elimination of purchasers and monopoly. The constitution of the state of Minnesota makes it unlawful to interfere with or restrict the freedom of markets for food products (Art. IV, Sec. 35), and the Supreme Court of Minnesota, in the case of State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527, has said that "Preserving freedom of markets is as important as the prevention of fraud." We cannot see how the supreme court can consistently with these policies and rules of law hold as constitutional the statute here under consideration.

Certainly there can be no question but that this statute is an arbitrary and unreasonable interference and infringe- [fol. 138] ment upon the right of contract, and takes from the companies engaged in the business of purchasing the

commodities covered by the statute their rights and properties without due process of law, in violation of both the state and federal constitutions.

II

The statute creates an unreasonable burden upon interstate commerce in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States, and in violation of the laws of congress covering interstate commerce.

Shafer v. Farmers Grain Co., 69 L. Ed. (U. S.) 554.

Lemke v. Farmers Grain Co., 258 U. S. 50, 66 L. Ed. 458.

12 Corpus Jurisprudence 26.

As has been pointed out, the complaint filed in this prosecution declares that the butterfat "was purchased for shipment and was shipped to Sioux City, Iowa, for manufacture and sale thereat." In fact, as the record discloses, the Fairmont Creamery Company, in the entire southern half of Minnesota, purchases butterfat for shipment to Sioux City. That is the place of manufacture of the butterfat into butter. All of the purchases of the Fairmont Creamery Company in this district are part of interstate commerce.

As has also been pointed out, this law in its operation [fol. 139] applies almost entirely to centralized creameries, the large creameries which purchase in the state and ship long distances. A great portion of the butterfat purchased in the state being purchased for shipment and shipped to points outside of the state, all constituting interstate commerce.

The 660 farmers co-operative creamery companies, each one of them doing business at its particular town and locality, do no shipping and have no transportation costs. They purchase at one place only. They are not affected by this law. The law does not touch them. In practical effect the law operates only upon cream bought for shipment, since companies purchasing at more than one place must ship in order to collect their cream. Others do not ship. The law simply attempts to establish for those who do not ship, local monopolies.

It is apparent that the law in its operation hits the centralized creameries who transport, and that in its operation it directly affects the purchase of that great and substantial portion of the cream purchased by centralized creameries which is cream purchased as a part of interstate commerce. The large companies purchasing cream in Minnesota and shipping to their manufacturing plants outside of Minnesota, sell the manufactured butter in many states in the United States where local needs greatly exceed the production. The matter, therefore, of the purchase of butterfat in the state of Minnesota is not a matter of purely local concern, but is of concern to people in the several states [fol. 140] where the butter manufactured by the centralized creameries from cream from Minnesota is purchased.

It is the established rule that commerce includes the purchase of goods when the purchase is made with the direct object of shipping the goods to a place outside of the state where purchased.

"Commerce includes the purchase, sale and exchange of commodities transported interstate."

12 Corpus Juris. 26.

In the case of Lemke v. Farmers Grain Company, 258 U. S. 50, 66 L. Ed. 458, the Supreme Court of the United States held, in accordance with former decisions, that the purchase of grain in North Dakota, a substantial portion of which was intended for shipment to and sale at terminal markets in other states, conformably to the usual and general course of business in the grain trade, is interstate commerce, which a state may not regulate by a statute which has the effect of controlling and burdening such commerce.

The case of Shafer v. Farmers Grain Company, 69 L. Ed. (U. S.) 554, seems to us a case directly analogous to the situation here. That case followed the reasoning in the decision just above cited, Lemke v. Farmers' Grain Company. It involved the Grain Grading Act of the state of North Dakota. That act provides regulations for the purchase and grading of grain in North Dakota. The act prevents buying by grade unless the buyer secures from the [fol. 141] state a grading license for himself or his agent, and provides that no person shall buy any wheat by grade

excepting where one producer buys from another producer, unless it has been inspected and graded by a licensed inspector. Other regulations are provided, but these illustrate the nature of the provisions of the act. The court, referring to the purchase of grain for shipment to points outside of the state of North Dakota, said:

"Buying for shipment, and shipping to markets in other states, * * * constitutes interstate commerce,—the buying being as much a part of it as the shipping."

The court held that since the act directly regulated the buying of grain, and a substantial part of the buying of grain in North Dakota was part of interstate commerce, that the act was a direct burden and not an incidental interference with interstate commerce, and was therefore unconstitutional under the commerce clause of the United Stats Constitution. The court said:

"The decisions of this court respecting the validity of state laws challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here,—one, that a state statute enacted for admissible state purposes, and which affects interstate commerce only incidentally and remotely, is not a prohibited state regulation in the sense of that clause; and the other, that a state statute which, by its necessary operation, directly interferes with or burdens [fol. 142] such commerce, is a prohibited regulation and invalid, regardless of the purpose with which it was enacted."

The court distinguished the case of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, wherein a state statute regulating the storage charge for grain, held in the state elevators, was upheld as not being a direct burden upon interstate commerce, and said in reference to that case: "No restriction on buying or shipping was involved." And in referring to the case of W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. Ed. 619, the court refers to the distinction that the statute there "puts no obstacle in the way of the purchase by the defendant company of grain in the state."

In the Grain Grading Act of North Dakota, under consideration in the case of Shafer v. Farmers Grain Co., the court pointed out that a burden was directly placed upon the buying of grain for shipment. The court said:

"Wheat * * * is a legitimate article of commerce and the subject of dealings that are nation-wide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to congress and denied to the states by the commerce clause of the Constitution."

[fol. 143] The court, in referring to the importance of the purchase of wheat for shipment in interstate commerce, says that the wheat purchased in North Dakota——

"finds a market and is made available for consumption in other states, where the local needs greatly exceed the production. Obviously, therefore, the control of this buying is of concern to the people of other states as well as those of North Dakota."

As a summary of its decision, the court says:

"We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause."

That case applies the rules to a situation parallel to the situation here. The analogy is complete. Unquestionably the effect of the Minnesota statute here under consideration is to burden, interfere with, and in fact prevent the buying of cream for interstate shipment, giving the great and direct advantage to local purchasers of cream who do not ship. The act constitutes a direct burden upon interstate commerce. It oppressively restricts the right of contract in the business of carrying on interstate commerce in the commodities specified in the statute.

[fol. 144] III

The venue in the case was improperly laid since the prosecution was brought in the county where the lower price was paid, and the statute declares that the payment of the higher price constitutes the offense.

State v. Standard Oil Co., 129 N. W. 336 (Iowa).
Constitution of the State of Minnesota, Art. I, Sec. 6.
16 Corpus Jurisprudence p. 187, Sec. 262.

At Bingham Lake and Mountain Lake, in Cottonwood County, the price paid for butterfat was 35 cents. At Madelia, in Watonwan County, the price paid was 38 cents. The higher price was paid in Watonwan County. The prosecution was brought in Cottonwood County. The statute makes the payment of a higher price in one locality than in another the offense. If the statute is valid, the offense was committed in Watonwan County, where the higher price was paid, and not in Cottonwood County.

The phraseology of this statute is borrowed from the former statute, the only difference in the two statutes being that in the latter statute a portion of the former statute is omitted. The former statute was aimed to prevent a company from going into a locality and rasing the price in that locality so as to be able to take the cream from other purchasers, and by thus raising the price in that locality and taking the cream from competing concerns, to injure competition or create a monopoly. The former statute, in other words, was aimed at the payment of a higher price [fol. 145] than was reasonable, when such higher price was paid for an unlawful and wrongful purpose.

The present statute, as far as it goes, still uses the same terminology of the former. It declares the offense to be the payment of a "higher price" in one locality than in another. It is the higher price which the statute literally declares is wrong. This provision of the new statute, it is true, is based upon a false premise. It is based upon the premise that if a company pays one price at one place and then pays a higher price somewhere else, it necessarily and naturally follows that the higher price is an unreasonably high one, and is higher than the company should pay.

The statute does not attempt to raise presumption that the higher price is unreasonable, nor that it constitutes overbidding, nor that it was intended to injure competitors, nor that it was paid in order to gather an undue proportion of the cream business in that locality, but, on the other hand, by a legislative fiat it is declared that the payment of a higher price is wrong.

It is the payment of the higher price which the statute aims at, and this is held to be true by the opinion of the Supreme Court of Minnesota in the case of State v. Fairmont Creamery Company, 202 N. W. 714 (Minn.), supra. The court interpreting the statute, says:

"The statute seeks to prevent the destruction of competition by forbidding overbidding."

[fol. 146] If that is the object of the statute, then the place where the overbidding is done, which is the offense made by statute, would be the place where the offense is committed. It is there the competitors are injured. It is there that by destroying competition a monopoly could be created, and such are the evils that the supreme court says the statute seeks to prevent. It is true, of course, that in order to have a higher price in one locality than in another, a lower price is essential to the consummation of the offense. There must be a lower and a higher price paid, but it does not follow from that that the offense is committed in both counties.

In 16 Corpus Jurisprudence, page 187, section 262, the general rule is stated that:

"An offense is committed, of course, in that county in which the acts constituting the same are done, and where the acts are done in different counties the general rule is that the offense is committed in the county in which it is consummated, although in such a case statutes often permit the venue to be laid in either county."

In Minnesota there is no statute permitting the venue to be laid in either county, so that the exception to the rule above stated, made by statute, does not apply.

The case of State v. Standard Oil Company, 129 N. W. 336 (Iowa), is a case squarely in point on this proposition. The Minnesota Supreme Court, in its opinion, however,

does not refer to that decision. In that case the defend-[fol. 147] ant was charged with a violation of a statute which provided that anyone who in the sale of petroleum products "shall intentionally, for the purpose of destroying the business of a competitor in a locality and creating a monopoly, discriminate between different sections, cities or communities of this state by selling such commodity at a lower rate in one section" than in another, shall be guilty of unfair discrimination.

This statute dealt with the selling of products rather than the buying of them. Selling at a lower price was therefore made the offense, and the court held that the place where the lower price was paid was the place where the offense was committed, the court saying:

"It seems plain to us that the offense described by the statute is committed where an act is done for the purpose of destroying the business of a competitor in that locality and creating a monopoly. The defendant could not destroy the business of a competitor in Doon or create a monopoly there by charging a higher rate for gasoline in that community than it charged elswhere. While the general purpose of the statute was to prevent unfair discriminations, the very thing prohibited was the destroying of the business of a competitor and creating a monopoly by reason of such discriminations by selling at a lower rate in one community than in another, and it is evident that it is only where the sale is made at a lower rate that the offense described by statute is committed."

[fol. 148] Under the Iowa law, the offense was the underselling of a commodity. It was underselling which injured a competitor.

On the other hand, in purchasing it is overbidding which injures a competitor, and, as the statute here is interpreted to be aimed at overbidding, it is the place where the overbidding is done which is the locus of the offense, and the venue of the offense in this case should have been laid in Watonwan County.

Conclusion

For the reasons given, we respectfully submit that the rulings of the lower court, certified to this court for decision, were erroneous, and that each of the rulings of the district

court complained of should be reversed, and the statute upon which the prosecution is based be declared unconstitutional.

Fairmont Creamery Company, by E. J. Hainer, Leonard A. Flansburg, M. S. Hartman, Wilson Borst, Charles Flynn, Its Attorneys.

[fols. 148a & 148b] Service admitted this 24th of September, 1925.

Clifford L. Hilton, Attorney General.

[fol. 149] In Supreme Court of Minnesota

1926

State of Minnesota, Plaintiff-Respondent,

vs.

Fairmont Creamery Company, a Corporation, Defendant-Appellant

Appellant's Brief

Assignment of Errors

Comes now the Fairmont Creamery Company and makes the following assignment of errors in the judgment of the District Court entered herein as follows:

1

The judgment is erroneous since the prosecution and conviction and judgment of the court is based upon a statute (Section 1, of Chapter 120, of the Laws of Minnesota for 1923) which is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, [fol. 150] liberty or property without due process of law, and providing that no state shall deny to any person within its jurisdiction the equal protection of the law.

2

The judgment of the District Court is erroneous for the reason that the said statute upon which it is based is unconstitutional under the Fourteenth Amendment to the

Constitution of the United States, in that the statute deprives the defendant of its liberty to contract, and destroys the business and property of this defendant without due process of law, and discriminates against this defendant and all persons doing a business of buying milk, cream and butterfat when their business is carried on in several localities, and favors those persons and concerns which carry on such business in one locality.

3

The judgment of the District Court is erroneous for the reason that it is based upon said statute which is unconstitutional and is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, in that it arbitrarily and unreasonably interferes with this defendant's liberty of contract, and that said statute is not a reasonable exercise of the police power, and the provisions and object of said statute bear no relation to furthering the public health, safety or welfare.

[fol. 151]

4

The judgment of the District Court is erroneous for the reason that it is based upon the said statute which is unconstitutional and in violation of the commerce clause of the Constitution of the United States, Article I, Section 8, Clause 3, providing that Congress shall have power to regulate commerce between the states, and for the reason that said statute imposes a direct burden upon interstate commerce, and by reason of its operation prevents this defendant from carrying on its business in interstate commerce in the state of Minnesota.

5

The judgment of the District Court is erroneous since it is based upon the said statute, which is invalid by reason of its being in conflict with the statutes of the United States regulating and governing interstate commerce between the States.

Wherefore, the Fairmont Creamery Company prays that the judgment of the District Court be reversed and set aside and held for naught, and that the statute upon which said prosecution is based be held unconstitutional, and that judg-

ment be rendered in favor of the Fairmont Creamery Company, a corporation, including judgment for its costs.

Fairmont Creamery Company, a Corporation, Defendant-Appellant, by Hainer, Flansburg & Lee, Its Attorneys.

[fol. 152] [File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

25022

OPINION—Filed August 27, 1926

Syllabus

Laws 1923, c. 120 defining unfair discrimination in the buying of butter fat and prescribing a penalty held constitutional, following State v. Fairmont Creamery Co., 162 Minn. 146.

Order affirmed.

Opinion

The defendant was convicted of unfair discrimination in the buying of butter fat as defined by Laws 1923, c. 120, G. S. 1923, § 3907. The case was here before on certified questions. State v. Fairmont Creamery Co., 162 Minn. 146. This appeal is from the order denying a new trial.

The defendant cites and distinguishes Central Lumber Co. v. South Dakota, 226 U. S. 157; State v. Bridgeman & Russell Co. 117 Minn. 196; State v. Standard Oil Co., 111 Minn. 85; State v. Fairmont Creamery Co., 153 Iowa, 702; State v. Drayton, 82 Neb. 254. The statutes involved in them, taking the Minnesota statute involved in the Bridgeman & Russell Co. case as fairly typical, and it is, make it an essential element of the offense that the prohibited sale or purchase be "with the intention of creating a monopoly or destroying the business of a competitor." The distinction between such cases and the one before us is so obvious that we need not enlarge upon it. The state does not claim that these cases sustain the constitutionality of the 1923 statute. If an offense cannot be created by statute unless

such or equivalent words are used, or if the acts defined by [fol. 153] the statute as constituting unfair discrimination cannot constitute an offense, the conclusion reached on the former appeal is in error. And this is the troublesome question. We may put aside the cases cited as of no controlling value, but useful still as illustrative of one stage in the development of regulation and control.

The state's contention is that a particular transaction, though in it there inheres no purpose of creating a monopoly or destroying the business of a competitor, may be forbidden if the evil sought to be repressed cannot be prevented, in the fair judgment of the legislature, otherwise. It is for the legislature to find and balance evils, and find and apply the corrective. The basis of the legislation must not be arbitrary or fanciful. The guaranteed right of contract is not absolute; but under the guise of regulation or control the legislature may not engage in arbitrary price-fixing. Examples of lawful interference with contracts, not in themselves wrongful, because recognized evils can be corrected only if such contracts are prohibited, are shown in Booth v. Illinois, 184 U. S. 425, and Otis v. Parker, 187 U. S. 606; and less directly in Geer v. Connecticut, 161 U. S. 519; New York v. Hesterburg, 211 U. S. 31; State v. Shattuck, 96 Minn. 45.

A court cannot strike down a statute unless it can say that its basis is arbitrary or fanciful, or not in good faith and on sufficient grounds directed at the evil. It is presumed that the legislature knew the facts or informed itself. So large is the dairy industry, and of so general distribution throughout the state, that most of the legislators, if they were conversant with conditions in the communities which they represented, knew at first hand the facts of production and marketing of dairy products, and the grievances at which the statute was directed. This is necessarily true of all except the members from the non-agricultural districts, and we must assume that they, if [fol. 154] they were not possessed of competent first hand knowledge, informed themselves. We cannot say that the facts justifying such legislation did not exist. The cases are cited in the opinion on the former appeal.

The violation of the commerce clause of the constitution is again discussed. Since the former appeal there has

been decided Shafer v. Farmers' Grain Co., 268 U. S. 189. This has been considered and it does not call for a change of view.

The question of venue is the same as before and we adhere to our prior holding.

All the questions involved have been reconsidered. They are discussed in our opinion on the former appeal and we need not review them.

Order affirmed.

[fol. 155] In Supreme Court of Minnesota

Criminal Number 5963 and Criminal Number 25931

[Title omitted]

Stipulation re Submission of Cause—Filed October 27, 1926

Comes now the Fairmont Creamery Company through its attorneys, and comes now the State of Minnesota, through its attorneys, and the said parties hereby stipulate and agree that the above entitled case may be submitted to the Court upon the record and assignment of errors filed herein on the 27th day of October, 1926, as well as upon and together with the printed record and briefs and assignment of errors heretofore filed herein in the proceeding before said Court, known as Criminal No. 5963, and upon which former record and briefs, the questions in the case have heretofore been decided, and the opinion of the Court filed on August 27th, 1926; and it is stipulated that the parties need not reprint or refile said former record or briefs, and each of the parties hereto waives the filing of further briefs and waives oral argument.

Fairmont Creamery Company, a Corporation, Defendant-Appellant, by Hainer, Flansburg & Lee, Its Attorneys. State of Minnesota, Plaintiff-Appellee, by Clifford L. Hilton, Attorney General, Charles E. Phillips, Asst. Attorney General, Its Attorney-.

[File endorsement omitted.]

[fol. 156] IN SUPREME COURT OF MINNESOTA

25931

OPINION—Filed October 27, 1926

Per CURIAM:

The defendant appeals from a judgment entered on the 22nd day of September, 1926, in the district court of Cottonwood County, finding it guilty of a violation of chapter 120, Laws 1923, and adjudging it to pay a fine of $100. The judgment is affirmed upon the authority of State v. Fairmont Creamery Co., 162 Minn. 146, and State v. Fairmont Creamery Co., decided August 27, 1926.

[File endorsement omitted.]

[fol. 157] IN SUPREME COURT OF MINNESOTA

25931

[Title omitted]

JUDGMENT—Filed October 28, 1926

Pursuant to an order of Court heretofore duly made and entered in this case it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Cottonwood be and the same hereby is in all things affirmed.

Dated and signed October 28th, A. D. 1926.

By the Court.

Grace F. Kaercher, Clerk of Supreme Court Minnesota. (Seal.)

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 158] IN SUPREME COURT OF MINNESOTA

Criminal No. 5963 and Criminal No. 25931

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed October 27, 1926

To the Honorable Samuel B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota:

The plaintiff in error, the Fairmont Creamery Company, a corporation, respectfully shows:

That the Fairmont Creamery Company is a corporation organized and existing and doing business under the laws of the State of Minnesota, and is a citizen and resident of said state.

That a criminal prosecution was instituted against the Fairmont Creamery Company, plaintiff in error, in the State of Minnesota on a charge of a violation of Section 1, Chapter 120, Laws of Minnesota for 1923, General Statutes of 1923 of the State of Minnesota, Section 3907, and that the Fairmont Creamery Company was found guilty in said proceeding and adjudged to pay a fine of $100.00.

That this proceeding came before the Supreme Court of the State of Minnesota on August 27, 1926; that the Supreme Court of Minnesota entered a judgment affirming the decision of the lower court, and that by such decision and final judgment the said criminal prosecution was completely and fully disposed of in said court.

That thereafter the mandate on said judgment was sent to the District Court, in which the case has been tried, and the formal judgment entered, which judgment was transcripted on appeal to the Supreme Court of the State of Minnesota, and the judgment affirmed on the 27th day of October, 1926, on the ground that the decision of said court, on August 27, 1926, fully and finally disposed of said pro-
[fol. 159] ceeding, and that said judgment of the Supreme Court of Minnesota, of conviction and sentence upon the defendant to pay a fine of $100.00 for a violation of said statute, has become and is final, whereby manifest error

was committed to the great prejudice and damage of the plaintiff in error.

That the said Supreme Court of the State of Minnesota is the highest court of said State of Minnesota in which a decision in this suit and this matter could be had; that, as appears by the record, proceedings and decision of said Supreme Court, there was drawn into question in said suit and proceeding the validity of the statute of the State of Minnesota upon which said criminal prosecution was based, to-wit, Section 1, Chapter 120 of the Laws of Minnesota for 1923, otherwise shown in General Statutes of Minnesota for 1923, Section 3907, which is a statute in words and figures as follows, to-wit:

"Any person, firm, co-partnership or corporation engaged in the business of buying milk, cream or butterfat for manufacture or for sale of such milk, cream or butterfat, who shall discriminate between different sections, localities, communities or cities of this state, by purchasing said commodities at a higher price or rate in one locality than is paid for the same commodities by said person, firm, co-partnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture, or locality of sale of such milk, cream or butterfat, shall be deemed guilty of unfair discrimination and upon conviction thereof, shall be punished by fine not exceeding One Hundred Dollars ($100.00), or by imprisonment in the County Jail for not exceeding ninety (90) days."

That in said proceeding the plaintiff in error contended said statute was unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, in that said statute deprived said plaintiff in error of its property without due process of law, and that it deprived this plaintiff in error of liberty of contract, and unreasonably and arbitrarily interfered with the rights of this [fol. 160] plaintiff in error to enter into contracts, and that it denied to this plaintiff in error the equal protection of the laws, and that it unlawfully deprived this plaintiff in error of its business of buying milk, cream and butterfat in the State of Minnesota, and that the statute was unconstitutional and in violation of the commerce clause of the Consti-

tution of the United States, Article I, Section 7, Clause 3, providing that Congress shall have power to regulate commerce between the states, and that it was in violation of said section for the reason that the said statute of Minnesota imposes a direct burden upon interstate commerce.

That the supreme court of Minnesota in said decision and judgment entered by it has held said statute constitutional, and in such holding has committed errors to the prejudice of this plaintiff in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, plaintiff in error prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Minnesota for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that the proper order be entered fixing the amount of supersedeas bond required of plaintiff in error.

Fairmont Creamery Company, a Corporation, Plaintiff in Error, by Hainer, Flansburg & Lee, E. J. Hainer, Leonard A. Flansburg, George A. Lee, Its Attorneys.

The writ of error, as prayed for in the foregoing petition, is hereby allowed this 27 day of October, 1926, conditioned on petitioner in error giving supersedeas bond, conditioned as required by law, in the sum of $1,000.

Dated at Saint Paul, Minnesota, this 27 day of October, 1926.

S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

[File endorsement omitted.]

[fol. 161] IN SUPREME COURT OF MINNESOTA

Criminal No. 5963 and Criminal No. 25931

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 27, 1926

Comes now the plaintiff in error in the above entitled cause and respectfully submits and shows that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota, in the above entitled matter, there is manifest error, to the grievous injury and wrong and to the prejudice and against the rights of the plaintiff in error, in this:

1

The judgment is erroneous since the prosecution and conviction and judgment of the court is based upon a statute (Section 1, of Chapter 120, of the Laws of Minnesota for 1923) which is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law, and providing that no state shall deny to any person within its jurisdiction the equal protection of the law.

2

The judgment of the Supreme Court is erroneous for the reason that the statute upon which it is based is unconstitutional under the Fourteenth Amendment to the Constitution of the United States, in that the statute deprives the plaintiff in error of its liberty to contract, and destroys the business and property of this plaintiff in error without due process of law, and discriminates against this plaintiff in error and all persons doing a business of buying milk, cream and [fol. 162] butterfat when their business is carried on in several localities, and favors those persons and concerns which carry on such business in one locality.

3

The judgment of the Supreme Court is erroneous for the reason that it is based upon said statute, which is unconstitutional and is in violation of the provisions of the Fourteenth Amendment to the constitution of the United States, in that it arbitrarily and unreasonably interferes with this plaintiff' in error's liberty of contract, and that said statute is not a reasonable exercise of the police power, and the provisions and object of said statute bear no relation to furthering the public health, safety or welfare.

4

The judgment of the Supreme Court is erroneous for the reason that it is based upon the said statute which is unconstitutional and in violation of the commerce clause of the Constitution of the United States, Article I, Section 8, Clause 3, providing that Congress shall have power to regulate commerce between the states, and for the reason that said statute imposes a direct burden upon interstate commerce, and by reason of its operation prevents this plaintiff in error from carrying on its business in interstate commerce in the State of Minnesota.

5

The judgment of the Supreme Court is erroneous since it is based upon the said statute, which is invalid by reason of its being in conflict with the statutes of the United States regulating and governing interstate commerce between the states.

Wherefore, for these and other manifest errors appearing in the record, the Fairmont Creamery Company, a corporation, plaintiff in error, prays that the judgment of the said Supreme Court of the State of Minnesota be reversed and set aside and held for naught, and that the statute upon [fol. 163] which the prosecution was based be held unconstitutional, and that judgment be rendered for plaintiff in error, including judgment for its costs.

Fairmont Creamery Company, a Corporation, Plaintiff in Error, by Hainer, Flansburg & Lee, Its Attorneys.

[File endorsement omitted.]

[fol. 164] In the Supreme Court of Minnesota

Criminal No. 5963 and Criminal No. 25931

[Title omitted]

Order Allowing Writ of Error—Filed October 27, 1926

The above entitled matter coming on to be heard upon the petition of the plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Minnesota, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the question presented by the record in said matter:

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and the bond presented by said petitioner be and the same is hereby approved, said bond to operate as a stay of execution, pending review.

Dated at Saint Paul, Minnesota, this 27 day of October, 1926.

S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

[File endorsement omitted.]

[fols. 165-167] Bond on writ of error for $1,000, approved and filed October 27, 1926. omitted in printing.

[fol. 168] IN SUPREME COURT OF MINNESOTA

WRIT OF ERROR

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Minnesota, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota before you, being the highest court of law or equity in said state in which a decision could be had in the said suit between the State of Minnesota, defendant in error, and the Fairmont Creamery Company, a corporation, plaintiff in error, wherein was drawn in question the validity of a statute of the State of Minnesota, on the ground of its being repugnant to the Constitution of the United States and to the statutes of the United States, and the decision was in favor of its validity, and thereby a manifest error hath happened to the great damage of the said Fairmont Creamery Company, a corporation, as by its complaint appears. We, being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you will have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

[fol. 169] Witness the Honorable William Howard Taft, Chief Justice of the United States this 27th day of October, in the year of our Lord, one thousand nine hundred and twenty-six.

Joel M. Dickey, Clerk of the District Court of the United States, District of Minnesota, by Margaret L. Mullane, Chief Deputy. (Seal of U. S. Dist. Court, Dist. of Minnesota, Third Division.)

Allowed Oct. 27th, 1926. S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

[fol. 170] Citation, in usual form, showing service on Clifford L. Hilton, filed October 27, 1926, omitted in printing.

[fol. 171] In Supreme Court of Minnesota

Criminal 5963 and Criminal No. 25931

[Title omitted]

Præcipe for Transcript of Record—Filed October 27, 1926

To the Clerk of the Supreme Court of the State of Minnesota:

You are requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to a writ of error allowed in the above entitled cause, and to include in such transcript of record the following, to-wit:

1. The printed record filed in said cause by plaintiff in error at the June, 1925 term of the Supreme Court of the State of Minnesota, Criminal Docket No. 5963, including complaint, warrant, judgment of justice, notice of appeal, motion to quash, showing of proceedings taken and of all evidence adduced, with exhibits, recital of filing of bond and service and notice of motion, assignment of erors, and all other things included in said printed record.

2. The ten assignments of error shown in brief of appellant, beginning on page three and ending on page five thereof. Case Criminal Number 5963.

3. Opinion of the court filed August 27, 1926.
4. Opinion of the Court dated February 27, 1925.
5. Printed record filed October 27, 1926 including Transcript of judgment, Mandate, Judgment of District Court, Order, Notice of Appeal, Appeal Bond.
6. Stipulation.
7. Per curiam opinion filed October 27, 1926.
8. Assignments of error filed in printed brief filed October 27, 1926.

[fol. 172] 9. Petition for writ of error.
10. Assignment of errors.
11. Allowance of writ of error.
12. Order for writ of error.
13. Bond on writ of error.
14. Writ of error.
15. Citation and return.
16. Præcipe.

Fairmont Creamery Company, a Corporation, Plaintiff in Error, by Haines, Flansburg & Lee, Its Attorneys.

STATE OF MINNESOTA,
Ramsey County, ss:

I, the undersigned, attorney of record for the State of Minnesota, defendant in error in the above entitled cause, hereby acknowledge receipt of a copy of the above præcipe, and acknowledge due service of the above præcipe on me this 27 day of October, 1926.

Clifford L. Hilton, Charles E. Phillips, Attorneys for the State of Minnesota, Defendant in Error.

[File endorsement omitted.]

[fol. 173] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 174] Return to writ of error omitted in printing.

[fol. 175] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFF IN ERROR TO PRINT THE ENTIRE RECORD—Filed November 6, 1926

Comes now the plaintiff in error and, in compliance with paragraph 9 of rule 11, files this its statement of the points on which it intends to rely in the above case and of the parts of the record which it thinks necessary for the consideration thereof.

Points

1. That there is manifest error in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota in the above matter in this, that the Supreme Court in its opinion, rulings and judgment was in error in holding that the statute known as Section 1, of Chapter 120, of the Laws of Minnesota for 1923, otherwise known as Section 3907 of the General Statutes of 1923, was constitutional, and in holding that it was not in violation of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law, and providing that no state shall deny to any person within its jurisdiction the equal protection of the law.

2. That there is manifest error in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota in the above matter in this, that the [fol. 176] Supreme Court in its opinion, rulings and judgment was in error in holding that the said statute of the State of Minnesota was constitutional, and in holding that it did not violate the Fourteenth Amendment to the Constitution of the United States, and in holding that it did not deprive the plaintiff in error of its liberty to contract, nor destroy the business and property of the plaintiff in error without due process of law, and in holding that it did not discriminate against the plaintiff in error in its business of buying milk, cream and butterfat when its business was carried on in several localities, and in favor of those persons and concerns which carry on business in one locality.

3. That there is manifest error in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota in the above matter in this, that the Supreme Court in its opinion, rulings and judgment was in error in holding that said statute was constitutional, and in holding that it was not in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and in holding that said statute did not arbitrarily and unreasonably interfere with the plaintiff's in error liberty of contract, and in holding that said statute was a reasonable exercise of the police power.

4. That there is manifest error in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota in the above matter in this, that the Supreme Court in its opinion, rulings and judgment was in error in holding that said statute was constitutional, and in holding that it was not in violation of the commerce clause of the Constitution of the United States, Article I, Section 8, Clause 3, providing that Congress shall have power to regulate commerce between the states, and in holding that said statute did not impose a direct burden upon interstate commerce, and did not by its operation prevent this plaintiff [fols. 177 & 178] in error from carrying on its business in interstate commerce in the State of Minnesota.

5. That there is manifest error in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota in the above matter in this, that the Supreme Court in its opinion, rulings and judgment was in error in holding that the said statute was not invalid and was not in conflict with the statutes of the United States regulating and governing interstate commerce between the states.

Parts of Record Necessary for a Consideration of Said Points and Designated to be Printed by the Clerk

1. The complete transcript of the record as prepared, certified and returned by the Clerk of the Supreme Court of Minnesota to the Supreme Court of the United States.

It being the intention by the foregoing to designate as necessary to be printed the whole record in the above case,

as certified by the Clerk of the Supreme Court of Minnesota.

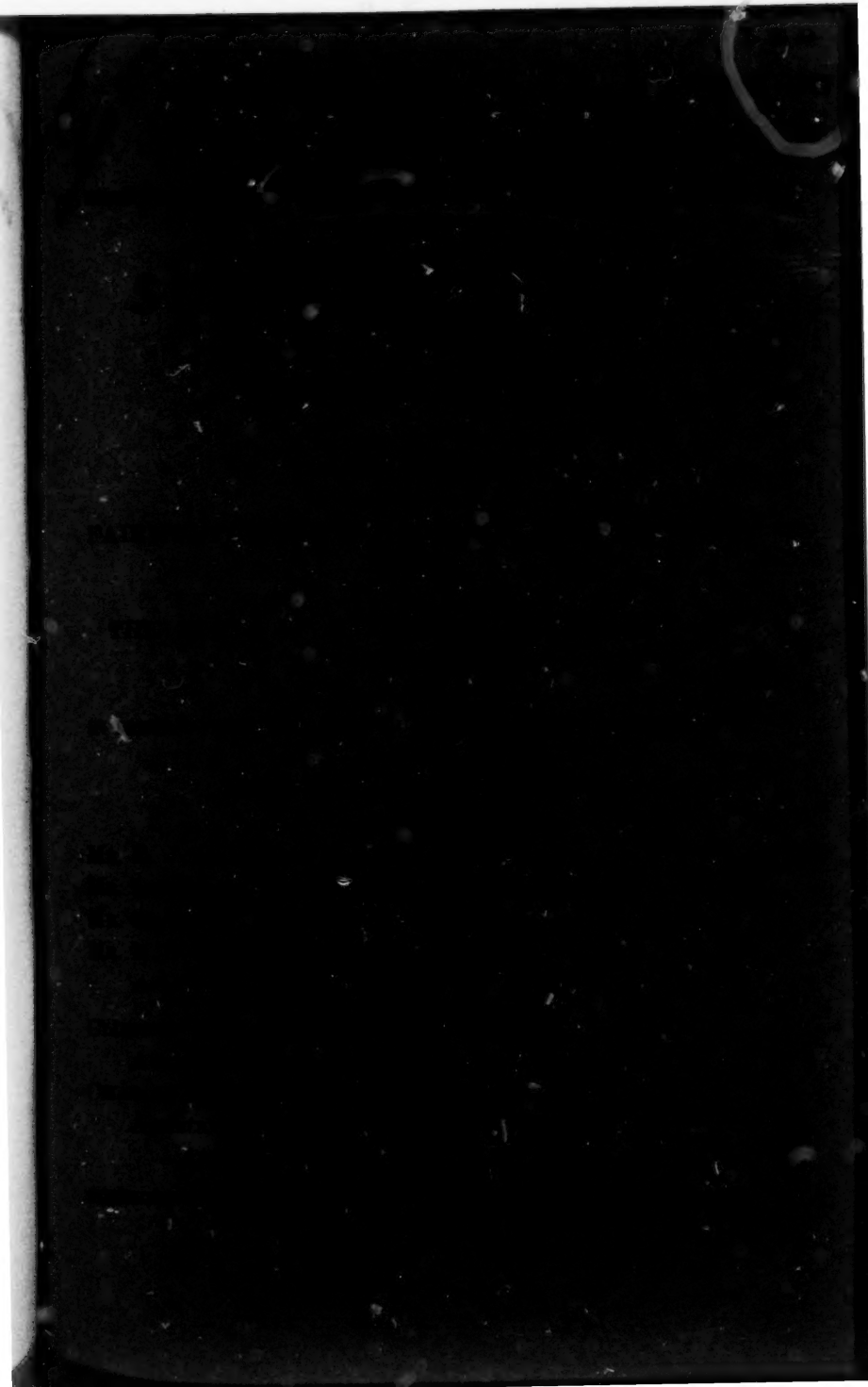
E. J. Hainer, Howard A. Flansburg, Geo. A. Lee, Attorneys for Petitioner in Error.

STATE OF MINNESOTA,
Ramsey County, ss:

I, the undersigned, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge receipt of a copy of the above statement of points and designation of parts of the record, necessary for a consideration thereof, to be printed and acknowledged due service thereof on this 1st day of November, 1926.

Clifford L. Hilton, Attorney General, Charles E. Phillips, Asst. Attorney General, Attorney- for Defendant in Error.

Endorsed on cover: File No. 32,292. Minnesota Supreme Court. Term No. 725. Fairmont Creamery Company, plaintiff in error, vs. The State of Minnesota. Filed November 6th, 1926. File No. 32,292.



INDEX

CASES CITED.

Number 725

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1926

FAIRMONT CREAMERY COMPANY, PLAINTIFF IN ERROR,

V.

THE STATE OF MINNESOTA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF OF PLAINTIFF IN ERROR

MR. E. J. HAINER, of Lincoln, Nebraska,
MR. LEONARD A. FLANSBURG, of Lincoln, Nebraska,
MR. GEORGE A. LEE, of Lincoln, Nebraska,
MR. M. S. HARTMAN, of Omaha, Nebraska,
Attorneys for Plaintiff in Error.

CLIFFORD L. HILTON, St. Paul, Minnesota,
Attorney General of Minnesota,
CHARLES E. PHILLIPS, St. Paul, Minnesota,
Assistant Attorney General,
Attorneys for Defendant in Error.

NATURE OF THE CASE

This case comes here from the Supreme Court of the State of Minnesota on a writ of error.

In a criminal prosecution the court upheld the constitutionality of a state statute which it is contended is repugnant to the Constitution of the United States. Three opinions have been written in the case, the citations of which are as follows:

State v. *Fairmont Creamery Company*, 202 N. W. 714, 162 Minn. 146.

State v. *Fairmont Creamery Company*, 210 N. W. 163 (decided Aug. 27, 1926).

State v. *Fairmont Creamery Company*, 210 N. W. 608 (decided Oct. 27, 1926).

Originally, when the case came to trial in the District Court of Minnesota, the district judge certified, without trial, the constitutional questions to the supreme court of the state for decision, and upon presentation to the supreme court of these questions, the first opinion, in 202 N. W. 714, 162 Minn. 146, was written.

The case was then remanded and tried in the district court, and the Fairmont Creamery Company found guilty of a violation of the law. Upon a review of the order denying a motion for new trial, the supreme court wrote the opinion in 210 N. W. 163 (decided Aug. 27, 1926).

The case was then again remanded to the district court and the defendant sentenced to pay a fine of $100.00, and upon hearing on review of the final judgment, assessing a fine of $100.00, the Supreme Court of Minnesota filed the opinion in 210 N. W. 608 (decided Oct. 27, 1926), based upon its conclusions as set forth in the former opinions.

On October 27, 1926, after the final affirmance of the judgment of conviction and sentence of the Fairmont Creamery Company, the writ of error bringing the case to this court was issued.

The Fairmont Creamery Company in this proceeding has been convicted of a violation of section 1, chapter 120, Laws of Minnesota for 1923 (Gen. Stat. 1923, Sec. 3907), which is a statute requiring any person purchasing butterfat and dairy products in the state of Minnesota to pay the same prices at all places in the state which such person pays at any one place. The text of the statute is as follows:

> "Any person, firm, co-partnership or corporation engaged in the business of buying milk, cream or butterfat for manufacture or for sale of such milk, cream or butterfat, who shall discriminate between different sections, localities, communities or cities of this state, by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by said person, firm, co-partnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture or locality of sale of such milk, cream or butterfat, shall be deemed guilty of unfair discrimination, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail for not exceeding ninety days."

GROUNDS OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The constitutionality of the statute of the state of Minnesota, referred to, is drawn in question and has been passed upon by the Supreme Court of Minnesota.

From the commencement of the case the plaintiff in error Fairmont Creamery Company has contended that the statute was unconstitutional, as in violation of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person

of life, liberty or property without due process of law, and providing that no state shall deny to any person within its jurisdiction the equal protection of the law; and has contended that the statute was unconstitutional as in violation of the commerce clause of the Constitution of the United States, article I, section 8, clause 3, providing that Congress shall have power to regulate commerce between the states.

These contentions were first raised in the District Court of Minnesota by motion to quash the complaint (Trans. of Rec., p. 5). The contentions were renewed in the assignment of errors in the briefs filed on appeal in the Supreme Court of the State of Minnesota (Trans. of Rec., pp. 71, 72, and 102, 103), and the Supreme Court of Minnesota has upheld the statute, the holding of the court, as evidenced by the syllabus in the opinion (202 N. W. 714, 162 Minn. 146), declaring:

> "The statute does not violate the equality provision of the federal or state constitution.
>
> "It does not violate the liberty of contract provision of the federal or state constitution.
>
> "It does not contravene the commerce clause of the federal constitution."

And this opinion was reaffirmed in the later opinions hereinabove referred to (Trans. of Rec., pp. 104, 107).

STATEMENT OF THE CASE

The statute upon which the prosecution is based is section 1 of chapter 120 of the Laws of 1923 (Gen. Stat. 1923, Sec. 3907), and is as follows:

> "Any person, firm, co-partnership or corporation engaged in the business of buying milk, cream or

butterfat for manufacture or for sale of such milk, cream or butterfat, who shall discriminate between different sections, localities, communities or cities of this state, by purchasing such commodities at a higher price or rate in one locality than is paid for the same commodities by said person, firm, co-partnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture, or locality of sale of such milk, cream or butterfat, shall be deemed guilty of unfair discrimination and upon conviction thereof, shall be punished by fine not exceeding one hundred dollars ($100.00), or by imprisonment in the county jail for not exceeding ninety (90) days."

This statute repealed a former statute—section 305 of the Laws of Minnesota for 1921.

In a comparison of these two statutes it is seen that the former, the 1921 statute, which had been the law in Minnesota for a long period of years, was in the usual form and contained the provisions regularly found throughout the United States in such statutes. It declared unlawful the purchase of commodities at one price in one locality and at a higher price in another locality *when such higher price was paid "for the purpose of creating a monopoly, or to restrain trade, or to prevent or limit competition, or to destroy the business of a competitor."*

The present statute, the one upon which the prosecution is based, makes it unlawful for any company or person to purchase the commodity specified at one price in one locality and then pay a higher price at the same time in another locality, regardless of the purpose or circumstance under which such higher price is paid. The provision of the former law covering the element of wrong-

ful purpose, which we have just above quoted, was entirely omitted from the present law.

The complaint filed in this proceeding (Trans. of Rec., p. 1) sets forth that the Fairmont Creamery Company, a corporation organized under the Minnesota laws, purchased butterfat at three different towns—at Mountain Lake and Bingham Lake, in Cottonwood County, where it paid 35 cents per pound for butterfat, and at Madelia, in Watonwan County, where it paid 38 cents per pound for butterfat,—and declares that said butterfat "was purchased for shipment and was shipped to Sioux City, Iowa, for manufacture and sale thereat," and that the cost of transportation of said butterfat from the points where purchased to Sioux City, Iowa, did not account for the higher price paid at Madelia.

The complaint does not allege that the higher price paid at Madelia was for any wrongful purpose—that is, of creating a monopoly, or restraining trade, or destroying or injuring the business of a competitor. The statute under which the prosecution is based did not expressly make that an element of the offense.

The circumstances under which these prices were paid, what caused the differences in price, what were the conditions which made the difference, and who brought those conditions about, the complaint does not set forth.

STATEMENT OF FACTS

The towns of Bingham Lake, Mountain Lake, and Madelia are situated upon one line of railroad, connecting them with Sioux City. Bingham Lake is the closer to Sioux City, and ten miles east of that is Mountain Lake, and thirty-four miles east is Madelia.

On June 11, 1923, the state dairy inspector sold cream to the Fairmont Creamery Company at Bingham Lake and at Mountain Lake at the price of 35 cents per pound of butterfat at each town, and on the same day sold cream to the Fairmont Creamery Company at the town of Madelia, and the price at Madelia which was paid by the Fairmont Creamery Company was 38 cents. It is claimed that the Fairmont Creamery Company, by the payment of the price of 35 cents at Bingham Lake and Mountain Lake, discriminated against the town of Madelia, where the price of 38 cents was paid. The prosecution claimed that the payment of the lower price effected a discrimination and the venue was laid in the county where the lower price was paid. The state proved no more than to show these prices, and rested its case.

The defendant offered to prove the following facts, some of which were admitted in evidence, and some were refused admission by the court. The facts, however, offered or proven, stand admitted for the purpose of the suit.

At Mountain Lake and Bingham Lake, where the 35 cent price was paid, the conditions governing the price of cream were practically the same, the butterfat content of the cream was the same, and the conditions as to competition were alike. There were few buyers at these two stations.

At Madelia, however, where the 38 cent price was paid, the situation was entirely different. At that town there were two creameries operating: one, the Worthington Creamery Company, owned by an individual concern; and the other, the Farmers Co-Operative Creamery Company. There were also, besides these two creameries, the Fairmont Packing Company, a concern in no way

connected with the defendant, and the Madelia Produce Company, as well as the defendant the Fairmont Creamery Company, which had buying stations located at Madelia. There was also located not far from Madelia the town of Lake Crystal, and this town had creameries, among which was a farmers co-operative creamery, and a number of buying stations operated by different individuals. Between the town of Madelia and the town of Lake Crystal was a territory which was an abundant producer of cream, and which was reached by roads in fine condition, and Madelia and Lake Crystal competed with each other keenly in the purchase of cream from that intermediate territory.

Proof was offered to show that a Farmers Co-operative Creamery Company at Lake Crystal sent its trucks and wagons out into this territory and into the territory near Madelia and picked up cream at the farmer's door, not requiring the farmer to carry the cream to market at Lake Crystal. This Farmers Co-operative Creamery Company paid 38 cents a pound for butterfat. The creameries and buying stations at Lake Crystal met the price of the farmers co-operative at that place and also paid 38 cents, and at Madelia the creameries and buying stations paid 38 cents to the farmers in this territory in order to meet the price which was being paid at Lake Crystal, which price was initiated by the Farmers Co-Operative Creamery Company there. The Fairmont Creamery Company paid the price of 38 cents only after it had been established in the manner as above stated. Had the creameries and buyers at Madelia not met this price of 38 cents established by the Farmers Co-Operative Creamery Company they would have been unable to purchase cream and would have lost the patronage which they had established in this territory and which they had theretofore enjoyed.

It also appears that the butterfat content of the cream purchased at Bingham Lake and Mountain Lake was not the same as that of the cream purchased at Madelia. At Bingham Lake and Mountain Lake the content was 14 and 15 per cent while that at Madelia was 20 per cent. Although the quantity of butterfat con- were in this district 1000 cream-buying stations owned by tent in the cream measures the total price, still the percentage of butterfat is an element which enters into value, for the greater the butterfat content the more butterfat is shipped for the same transportation charge in a given amount of cream. Transportation rates on cream are so much a can, regardless of butterfat content. Where cream is rich in butterfat it is evident that more cream may be shipped to market in a can for a given price than where the cream is low in butterfat content. A company therefore can afford to pay more when the cream is rich in butterfat content than it can when the cream is of a lower butterfat content. In this case it would appear that the difference in butterfat content would justify a difference in price between Madelia and the towns of Mountain Lake and Bingham Lake of somewhere near 1 cent. Though this would not justify the entire difference in price paid between these different towns, it would justify to some extent a portion of the difference.

The higher price paid at Madelia was brought about by reason of the combination of circumstances above described. The trial court held that this did justify the defendant in paying a higher price and did not constitute a defense.

Proof was further offered to show that the Farmers Co-Operative Creamery Company at Lake Crystal changed hands shortly after the date in question, and that it began paying a lower price, and that the prices at Madelia were

lowered in consequence of the lowering in price at Lake Crystal.

The testimony of Mr. Bland, superintendent of the Fairmont Creamery Company, was offered to show that in the southern part of Minnesota, where the Fairmont Creamery Company was purchasing cream, there were 300 farmers' co-operative creamery companies and local independent companies also purchasing cream, and that there were in this district 1000 cream-buying stations owned by the several companies doing business there.

Mr. Bland had been in the creamery business for many years, and for the last nine years had been superintending the business of the defendant in the southern part of Minnesota, and his testimony was offered to show that the price paid for cream in the different towns and cities in this district has varied in each town; that the variation has been from 1 cent to 8 cents; that such price is exclusive of and has no relation to transportation charges; that such variation is the normal condition of the market in the sale of cream and butterfat, and is the result entirely of competitive conditions; that in certain localities there are many more competitors than there are in others; that the quality of cream differs in different localities; that the equipment and efficiency of creameries in the various localities differ, and that each of these things enters into the price that is paid for the butterfat in the particular locality where the sale is made; that this variation in price, in each town, in the southern half of Minnesota, existed on the 11th day of June, 1923, and that though prices fluctuate, the fact of variation is constant; that such condition had existed for nine years previous; and that these variations in price are due entirely to the economic conditions in each locality, and to competition.

The testimony of Mr. Farrell, secretary of the Dairy Products Association of the Northwest, covering a district in which the state of Minnesota is included, was also offered. It appeared that he had operated creameries for twenty-two years in Minnesota, and that since 1918 he had been connected with the Dairy Products Association. The testimony offered by him was that there were, in 1923, 839 creameries in operation in Minnesota, and that in 1924 there were 841; that of these 839 companies, 170 were independents, and what are known as centralized creameries, and that the balance, 660, were farmers' co-operative creamery companies, which were local concerns not associated the one with the other, and that these farmers' co-operative companies, in their several activities taken altogether, reached into all the places in the state in their purchases of cream, though individually they purchased locally.

His testimony was also offered to show that the price for cream in the various towns and cities of the state varied from 1 to 8 or 9 cents in the different localities, towns, and cities, and that such variation in prices were exclusive of and bore no relation to transportation charges, and that such range of prices or variation has been a fact which has been constant in the state for the last thirty years, and that such range and variation in price in the different localities is the normal condition of the price paid for cream, brought about by competition, quality of the cream purchased at these localities, and the natural ability and efficiency of local competitors. His testimony was also offered to show that in these localities the local competitors were paying for cream all that they could afford, and that if the price were by any possibility raised over the state so that it would be level, the local creameries operating in all those towns and cities, which were accus-

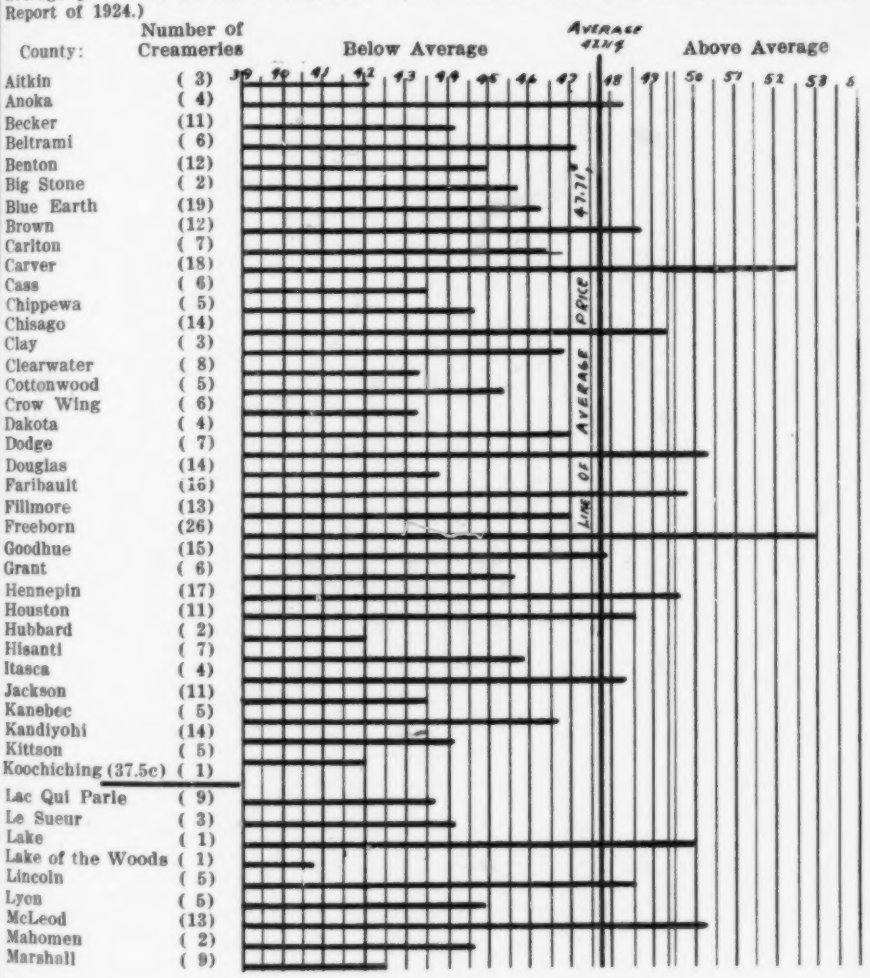
tomed to pay a smaller price than such established level price, would be unable to continue in business.

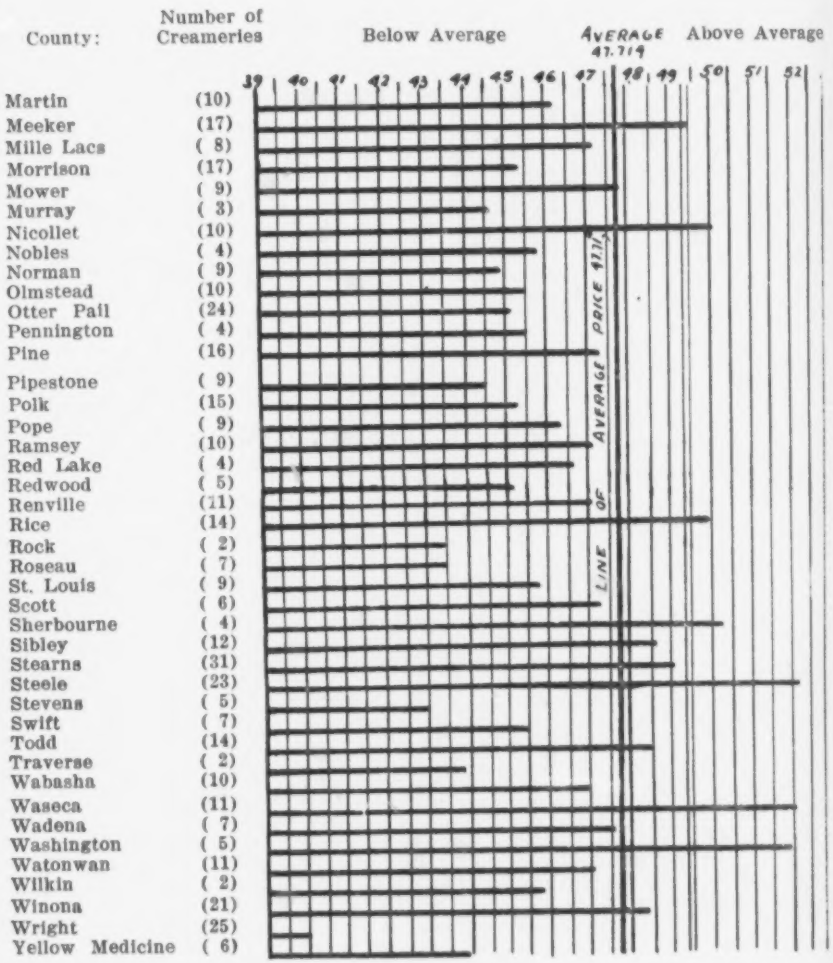
A portion of the official report of the commissioner of the State Dairy and Food Department, of the state of Minnesota, for the year 1924 (Exhibit 1), was offered in evidence, so far as it pertained particularly to creamery business done in the year 1923.

Based upon the facts and data furnished by this report is a graphic illustration indicating the average variation in price in the different towns and cities in the state of Minnesota for the year 1923 (blueprint Exhibit 2 attached to the record; Trans. of Rec., p. 56).

It appears by the report of the commissioner of the State Dairy and Food Department that the average price paid for cream during the year 1923, in all counties in the state, was 47.71 cents. There were only a few counties, if any, however, which paid that exact average price, each individual county either falling below or rising above that average. The range in prices as shown by this report was from 37.5 cents, the average price paid in Koochiching County, to 53 cents, paid in Freeborn County, and the prices paid at the various other cities and towns in the state range in between these two limits. Such an extent of variation in price, shown for the year 1923, is a normal condition, and one which has always existed in the cream business. The graphic illustration of the facts set forth in the dairy commissioner's report, and introduced as Exhibit 2, follows:

Graph showing counties and number of creameries paying prices at variance with average price and extent of variance. (Statistics of 1923 from Dairy Commissioners Report of 1924.)




County:
Number of Creameries
Below Average
AVERAGE 47.719
Above Average
39
40
41
42
43
44
45
46
47
48
49
50
51
52
AVERAGE PRICE 47.71
OF
LINE
Martin (10)
Meeker (17)
Mille Lacs (8)
Morrison (17)
Mower (9)
Murray (3)
Nicollet (10)
Nobles (4)
Norman (9)
Olmstead (10)
Otter Pail (24)
Pennington (4)
Pine (16)
Pipestone (9)
Polk (15)
Pope (9)
Ramsey (10)
Red Lake (4)
Redwood (5)
Renville (11)
Rice (14)
Rock (2)
Roseau (7)
St. Louis (9)
Scott (6)
Sherbourne (4)
Sibley (12)
Stearns (31)
Steele (23)
Stevens (5)
Swift (7)
Todd (14)
Traverse (2)
Wabasha (10)
Waseca (11)
Wadena (7)
Washington (5)
Watonwan (11)
Wilkin (2)
Winona (21)
Wright (25)
Yellow Medicine (6)

ASSIGNMENT OF ERRORS

1.

The judgment of the Supreme Court of Minnesota is erroneous since the prosecution and conviction and judgment of the court is based upon a statute (Sec. 1, Chap. 120, Laws of Minnesota 1923), which is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property without due process of law, and providing that no state shall deny to any person within its jurisdiction the equal protection of the law.

2.

The judgment of the supreme court is erroneous for the reason that the statute upon which it is based is unconstitutional under the Fourteenth Amendment to the Constitution of the United States, in that the statute deprives the plaintiff in error of its liberty to contract, and destroys the business and property of this plaintiff in error without due process of law, and discriminates against this plaintiff in error and all persons doing a business of buying milk, cream, and butterfat when their business is carried on in several localities, and favors those persons and concerns which carry on such business in one locality.

3.

The judgment of the supreme court is erroneous for the reason that it is based upon said statute, which is unconstitutional and is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, in that it arbitrarily and unreasonably interferes with this plaintiff in error's liberty of contract, and that

said statute is not a reasonable exercise of the police power, and the provisions and object of said statute bear no relation to furthering the public health, safety, or welfare.

4.

The judgment of the supreme court is erroneous for the reason that it is based upon the said statute which is unconstitutional and in violation of the commerce clause of the Constitution of the United States, article I, section 8, clause 3, providing that Congress shall have power to regulate commerce between the states, and for the reason that said statute imposes a direct burden upon interstate commerce, and by reason of its operation prevents this plaintiff in error from carrying on its business in interstate commerce in the state of Minnesota.

ARGUMENT

I

The statute is an arbitrary and unreasonable infringement of personal and property rights and an unwarranted and oppressive interference with liberty of contract, denies the equal protection of the law, and is for these reasons in violation of the Fourteenth Amendment to the Constitution of the United States.

It is apparent from the foregoing statement of facts that the normal condition of the market governing the price of cream is that prices differ in the various localities of the state, and the reason for this difference is obvious. The specific instance, upon which the prosecution is based, premised upon the difference in price between the towns of Madelia and Mountain Lake and Bingham Lake, is a good illustration of normal operation.

The company purchasing at different localities in the state can not purchase at its own prices. It must pay the prices which are found to exist there. The effect of the statute, therefore, is to exclude a company from purchasing except where it finds a market, which would be few and rare indeed, where it could purchase on the exact and identical price. It would be impossible for a purchaser dealing throughout the state to meet the competition in the multitude of localities in the state of Minnesota by fixing a flat level price at which it would buy. The defendant and other such purchasers have no control over the prices at which such commodities can be purchased in the state of Minnesota, and can not establish level prices even by concerting and agreeing among themselves in an attempt to do so. A level price could only be established, if it could be legally done, by a law fixing specific prices binding upon *all* purchasers of cream, whether doing business in one locality only or doing a business in several localities.

The vice of the act in question is that it goes too far. It does not stop at reasonable limits. It does not attempt regulation. It strikes down all transactions, even though the great mass of such transactions are entirely innocent in nature. It does not aim through the operation of its provisions nor by any declared purpose or intent to prevent monopoly or to prohibit injurious competition. All innocent contracts made in the normal way, and the prices responding to the normal market, if the person who makes such contracts happens to be dealing in different places, are declared unlawful. The statute does not aim at the payment of high and unreasonable prices and its oppressive features bear no rational relation to any wrong.

Prices not only vary but are continually fluctuating, and they do not change simultaneously at all places in the state. A change may occur in one locality and may be followed to other localities. Competition varies in different places. Market information and news travel more rapidly to some places than to others, causing prices there to fluctuate more readily. Weather and the crop conditions may vary with the different sections of the state, and, on the other hand, certain sections may have a larger supply than usual, caused by particularly favorable conditions, and farmers be willing to take a slightly lower price in order to get rid of their supply. Where there are more buyers, competition is keener, and this has an effect on price. Where the production is small and there are but few buyers, that also has its effect. These are principles that apply to all trade and business.

Those in competition must take prices as they find them; they can not control the prices. They must buy upon the market with other buyers, otherwise they are restrained from doing business.

Under this statute any local buyer can raise the price of cream and prevent the Fairmont Creamery Company from purchasing at that place unless it raises its price over the entire state. This immediately destroys free competition. The statute, in its effect, encourages, and in fact enforces, monopoly. It gives the local concern the power to raise the price, and this can not be met by the concern doing business at several points for, as the Supreme Court of Minnesota says, the large concern can not raise its price at one locality, for the operation of the statute makes it too expensive.

In other words, the statute is intended to give to the local purchaser an advantage denied to the purchaser

buying at many places. Not only does it give the local concern the advantage over those buying throughout the state, but it also places the farmer at the mercy of the local dairyman. The farmer is no longer free to contract as he pleases and with whom he pleases and at the prices upon which he desires to deal, for the general market conditions provided by the large buyers who go into all parts of the state are removed from him and an arbitrary restriction placed upon his buying from them.

The statute, furthermore, prevents a purchaser from varying the price it pays throughout the state for different grades of cream.

The effect of this statute is to hinder, impair, and actually destroy competition. It takes away insurance of a fair price, for it is full and free competition which guarantees such a price. Any arbitrary interference with full and free competition has the effect of producing a different price and therefore an unfair price.

By reason of competition and local conditions the price to be paid for butterfat varies, and always will vary. If all companies were purchasing in the state and shipping to one place, say that they were all shipping to Sioux City, then transportation charges would be identical, and if a 35 cent rate for butterfat were by some means put in force, the rate would be 35 cents all over the state, adding to it the cost of transportation. All shippers would be affected alike. However, it must furthermore be remembered that all companies do not ship to Sioux City. In fact, only one company, the plaintiff in error, does. Some companies ship to St. Paul and Minneapolis, some to other towns in the state of Minnesota, and many to towns outside the state of Minnesota, and the independents and

some 660 farmers' co-operative creamery companies which completely cover the purchasing territory in the state, *do not ship at all.*

In other words, different companies purchasing cream must, in fairness, not only be permitted to allow for their own transportation costs but in order to compete with other companies must be able to allow for the effect of transportation costs which the other companies pay, for that affects and causes variation in price. To refuse to allow that limits the rights of companies to purchase except at very few places. The inevitable effect of the statute is to restrict to local buying.

The Supreme Court of Minnesota, in its opinion (*State* v. *Fairmont Creamery Company*, 202 N. W. 714, *supra*), taking judicial notice, gives as the basis for justification of the statute the following reason:

> "A centralized creamery, supplied with ample capital and facilities, has the ability and meets the temptation to destroy competition at a buying station by *overbidding*, absorbing the resultant losses, if any, through the profits of its general business, and, when competition is ended, to buy on a non-competitive basis. If it does all this successfully it has a monopoly, and may or may not treat producers justly. *The statute seeks to prevent the destruction of competition by forbidding overbidding* unless the dealer makes prices at other buying points correspond after proper allowances for the cost of transportation. If the statute is obeyed, destroying competition is expensive."

But let us add if the local operator raises his price and overbids, it is also made expensive, in fact prohibitive, for the large buyer to even meet him or compete with him, for, in order to do so, the large buyer must raise

his price over the entire state. The statute does not operate with equality between the two.

The argument of the court is that the statute aims at the same evil at which the former statute was directed. That it aims to prevent unfair competition and the establishment of monopolies. This in face of the fact that the statute itself declares no such object, and actually has stricken from it, by the amendment, those provisions of the former law declaring against unfair competition and monopoly.

The opinion assumes that a large company can control the price, and that by paying *different* prices it can cause injury. The facts in the case, however, make it evident that a company can not control the price. It is argued that the company may reduce the price at one place and raise it at another. With co-operative creameries purchasing cream at all points in the state, how can a large creamery purchase cream at less than what the co-operative creameries are offering? It is quite obvious that such could not be done. A company *can not reduce* the price below what is reasonable at any point. The payment of one price at one place and one at another, *bears no logical relation to unfair competition.* As we have shown, it is the normal condition. Competitors can be injured, monopolies can be established, and dealers driven out of business, not by the payment of *different* prices at different localities, but by the payment of *high* and *unreasonable prices* at any or all localities.

The statute does not aim at the payment of high and unreasonable prices. In that respect it differs from the former law, and the distinction between this law and the former law, we think, the court has lost sight of. It

must be remembered that the former law made it an offense to pay a higher price at one locality than at another, only when the higher price injured competitors—when it was to drive others out of business and create a monopoly. Such wrongful objects could, of course, only be attained by the payment of prices unreasonably high. The higher price which was aimed at, therefore, was the kind of a price which works injury—an unreasonably high price. A reasonable price would not have such effect. The *former statute was aimed at unreasonable prices.* It bore a relation to wrong. It was logically prepared and formed to meet the evil of the payment of high prices which caused injury. The present statute does not aim at high prices. It does not aim at unreasonable prices. It says nothing about monopoly or unfair competition. The court assumes in its opinion that that was the object of the law. Whether this was the object or not, the law itself bears no reasonable relation to such an evil as the one intended to be prohibited. In its operation the law prevents companies from dealing on the normal market and meeting prices which are found there fixed and established by the natural workings of economic laws. The effect of the court's decision is to say that since centralized creameries have been guilty of overbidding, of which fact the court takes judicial notice, that centralized creameries may be prohibited absolutely from purchasing at more than one place, since in practical effect that is the result of the operation of the statute. The effect of the operation of this law is to prohibit persons from purchasing at different places, since in order to purchase at different places they must purchase at different prices.

The court in its opinion refers to the case of *Booth* v. *Illinois*, 184 U. S. 425, and other cases of similar character. Those cases are clearly distinguishable from the case

here. In that case a statute forbade *options* to sell or buy grain or other property *at a future time, though actual delivery was intended*. The statute covered all such contracts, though some, it is true, would not be gambling contracts. These contracts were prohibited because of their *natural tendency towards wrong*. The underlying principle of that decision and the other like decisions prohibiting certain callings, as stated in the above cited case, is as follows:

> "A calling may not in itself be immoral, and yet the *tendency* of what *is generally or ordinarily or often* done in pursuing that calling may be towards that *which is admittedly immoral or pernicious*. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts can not interfere unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

The statute in that case prohibited transactions which were of a character generally, ordinarily, and often tending towards gambling transactions, and in the *great majority* of instances actually constituted gambling transactions. Innocent transactions covered by the statute were comparatively few. The court found that the state could strike down the entire calling, even though by doing so some innocent transactions were affected.

In the case here just the reverse is true. It is the normal thing to pay different prices at different places. It is only the rare exception where different prices are

paid with wrongful intent and purpose to create a monopoly or injure competitors. It is unreasonable and unnecessary to strike down and declare unlawful the great mass of innocent transactions in order to prohibit the few which might be accompanied by wrong.

Freund in his work on "Police Power", section 59, upon the principle enunciated in the case of *Booth* v. *Illinois*, says:

> "The correct constitutional principle seems to be that a business serving valuable economic or social purposes may not be entirely prohibited, because it is attended with danger or liable to abuse, but that the policy of prohibition may be sustained if the business exists only for the gratification of pleasure, or has otherwise no legitimate function. It is true that a statute of Illinois has been sustained forbidding all contracts securing options in any kind of commodities, but the legitimate uses of this form of dealing are rare and insignificant as compared with the cases in which it constitutes a form of gambling, and they might possibly be saved by a restrictive interpretation of the act."

And in reference to the case of *Otis* v. *Parker*, 187 U. S. 606, 47 L. Ed. 327, in the same action, he says:

> "But dealings in stock and produce, even for future delivery, though extensively used for gambling purposes, are allowed since they are of great economic value and importance. The prohibition of bucket-shops is directed exclusively against fictitious transactions. The provision of the Constitution of California apparently directed against all transactions in stock to be delivered at a future day has been interpreted by the courts so as not to affect legitimate transactions."

The limit to the application of the doctrine of *Booth* v. *Illinois* is set forth in the case of *Adams* v. *Tanner*, 244

U. S. 590, 61 L. Ed. 1336, declaring a statute in Washington unconstitutional which prohibited the business of employment agencies, the court in the opinion saying:

> "Because abuses may and probably do grow up in connection with this business is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guarantees of the constitution can not be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

But we do not find that element mentioned in *Booth* v. *Illinois* and similar cases existing in the present case. The practice of paying different prices at different localities in the state is the normal condition, and does not carry with it *any tendency towards that which is immoral or pernicious*, nor does it bear any relation to wrong. The payment of different prices bears no relation to unfair competition, nor to the creation of monopolies. It is the payment only of *unreasonable prices, higher prices than are justified*, that is wrong, and the statute in its operation does not aim at nor cover that.

The present statute, as far as it goes, still uses the same terminology as the former. It declares the offense to be the payment of a "*higher price*" in one locality than in another. It is the higher price which the statute *literally* declares is wrong. If such a theory is given to the statute,

it is a theory based upon a false premise. It is based upon the premise that if a company pays one price at one place and then pays a higher price somewhere else, then that it necessarily and naturally follows that the higher price is an unreasonably high one, and is higher than the company should pay. A fallacious theory on its face.

The statute does not attempt to raise a *mere presumption* that the higher price is unreasonable, nor that it constitutes overbidding, nor that it was intended to injure competitors, nor that it was paid in order to gather an undue proportion of the cream business in that locality, but, on the other hand, by a legislative fiat it is declared that the payment of a higher price *is wrong.*

Although it is the payment of the *higher* price which the statute by its terms declares to be wrong, it is the payment of a *different* price whether higher or lower than some other that, by operation of the statute, actually constitutes the offense.

The Supreme Court of Minnesota, in construing the act, has held (see court's opinions) that the act aims at a *discrimination* in price, that is, the payment of a *different* price and not merely of a *higher* price.

As we have heretofore pointed out, the complaint was filed in the county where the *lower* price was paid, and objection was made that if any offense had been committed under the statute it was in the county where the *higher* price was paid and not the *lower* price. The court found that the venue was properly laid in the county where the *lower* price was paid, and that the offense was committed at a point where any price was paid different than a price paid by the same purchaser at some other point, whether such price was lower or

higher (see opinion 162, 146: 202 N. W. 714). If, under the statute, a company should pay an unreasonably high price all over the state, the statute would not be violated, though an unreasonable price had been paid and competition injured. On the other hand, if a company meets the conditions of the market and pays the prices found to exist, which vary in every community, it has done no harm to competition and has done the normal and natural thing, but it has violated the statute and committed an offense. In order to do business in different localities in the state without committing wrong it is essential that a company pay the prices found there, and it necessarily follows that it must pay different prices.

The legislature might as well say, for an example, that all contracts for the sale of land at a higher price than the purchase price should be prohibited, because in some such sales fraud is perpetrated. The sale of lands at an increase of price is a usual and normal occurrence, yet the fact that in some such sales fraud may be committed would not justify the state in refusing to allow any such sales to be made. Such a statute would be arbitrary and capricious.

So is the statute under consideration, which bears no relation to any wrong or evil, but which arbitrarily and capriciously says to all companies operating in the state that they can not do the normal thing and purchase at the prices which are found to exist in the several markets of the state.

The statute under consideration, except for a few recently enacted statutes following it, differs from all other such statutes—and there is probably an anti-discrimination statute in almost all, if not all, of the states—in that the

usual statute contains a provision that where a different price is paid in one locality than in another *for the purpose of creating a monopoly or destroying competition*, then payment of such price shall be unlawful. In each of these statutes the unlawful intent and purpose and the doing of a malicious wrong is the gist of the offense. In the statute under consideration, intent, and purpose, or the doing of a wrong, does not enter in. The statute declares that where one price is paid at one place and then a higher price is paid at another, the payment of the different prices is illegal no matter how reasonable nor what the circumstances were which affected the making of the higher price.

In our examination of those cases passing upon the usual statutes, which declare that a discrimination in price between localities shall be unlawful *when done for the purpose* of destroying competition or creating a monopoly, we find that the courts have carefully distinguished between those transactions which are made without such a purpose and those transactions which are made with a purpose to do wrong, and it is only by reason of the fact that the payment of the higher price in one locality is an unreasonably high price and is paid with the purpose of injuring another in his business, or of taking his business from him so as to create a monopoly, that the courts have found justification for upholding such laws as constitutional.

The very first decision to pass upon an antidiscrimination statute is that of *State* v. *Drayton*, 82 Neb. 254 (1908), 117 N. W. 768, 23 L. R. A. (N. S.) 1287, and note. The statute in that case provided that any person who shall intentionally, for the purpose of destroying the business of his competitor in any locality, discriminate between dif-

ferent localities by *selling* (instead of buying) commodities at a *lower* (instead of higher) rate in one section than in another, shall be guilty of an unlawful act. The court declared the law to be constitutional for the reason that it was aimed at the prevention of monopolies and at unfair competition, and that the *intent and purpose* with which a sale was made at a lower price at one place than at another was the gist of the offense. The court in the opinion says:

> "From a careful reading and study of the act in question, we are driven to the conclusion that it is not subject to attack. * * * It does not seek to prevent any person or corporation from engaging in any lawful business, nor does it prevent legitimate competition, nor seek to interfere in any way with the due management of anyone's business, *nor prevent the sale of any commodity at any price which the owner may fix or demand.* Indeed, the act recognizes the right of all to engage in the production, manufacture, distribution and sale of any and all commodities in general use. *There is a clear recognition in law, in commerce, and in the possession and use of property, that every person has the right to use his own as he sees fit, so long as he does not wrongfully use it in such a way as to interfere with the rights of others.* The whole fabric of civilized, social, and commercial life, and the enjoyment of liberty and ownership of property, are based upon compromises and limitations of the use of one's members and the control of his property. The act in question *only provides against the use and sale of one's property for the purpose of destroying the business of a competitor. The owner or dealer may sell for any price he may choose, on any terms he may adopt, without reference to what effect his action may have upon the trade or business of others, so long as he does not do so for the purpose named.* It may be that by underselling others he may draw trade away from them, or, indeed, the sec-

ondary effect may be to compel them to adopt his scale of prices or abandon their business; yet, if his conduct is not for the purpose and with the intention prohibited by the statute, he is violating no law, and no one can legally object to or interfere with his methods. The statute clearly makes the purpose with which the act is done the controlling element of the offense (p. 259).

"It is contended by counsel for defendant that 'the act interferes with freedom of contract,' and is therefore violative of the constitutions of both the federal and state governments. As we have already indicated, we are wholly unable to see where the previously existing right of the individual to enter into lawful contracts is in the least abridged or impaired. *It is not the making of contracts which is forbidden, but the conduct, purpose, and motives of the party in connection with his acts which brings him within the prohibition of the law*" (p. 265).

This case has been universally followed by other courts in decisions upon similar statutes, and the same reasoning employed, and clear and direct expressions of the courts being that except for the provision in the statutes confining their operation to those acts which *are wrongful and done to create monopoly, or to injure competition*, the statutes could not be upheld.

A similar case was decided by the Supreme Court of Minnesota in *State* v. *Bridgeman & Russell Company*, 117 Minn. 186, 134 N. W. 496. In that decision the supreme court sustained the constitutionality of the Minnesota statute as it existed before the statute was amended and placed in its present form. When that case was decided the statute describing the offense provided that a discrimination in prices, *"when done with the intention of creating a monopoly or destroying the business of a competitor,"*

would constitute an offense. And the Supreme Court of Minnesota, making the same distinction as was made in the Nebraska case (*supra*), sustained the statute, particularly pointing out that:

> "The payment relatively of a higher price for milk, cream, and butterfat in one locality than in another *is not forbidden* by our statute, for *it is only when such discrimination is made with the intention of creating a monopoly or destroying the business of a competitor* that the act is forbidden."

In the further case of *State* v. *Central Lumber Company*, 24 S. D. 136, 123 N. W. 504, 42 L. R. A. (N. S.) 804, and affirmed in 226 U. S. 157, involving a statute similar to those discussed in the decisions above cited, the Supreme Court of South Dakota upheld such a statute upon the same reasons as are set out in the decisions *supra*, the court in its opinion saying:

> "Bear in mind at all times that this law is aimed only at persons who resort to such 'unfair' methods with the *'intent' to destroy the business of their competitors.*"

In the case of *State* v. *Rocky Mountain Elevator Company*, 52 Mont. 487, 158 Pac. 818, was involved the question of the constitutionality of an antidiscrimination statute of that state, making the payment of a higher price in one place than in another illegal, when done for the purpose of creating a monopoly or destroying the business of a competitor, and in the opinion the court says:

> "It will be observed at once *that it was not the intention of the legislature that it should be a crime to pay a higher price for a commodity in one part of the state than in another*, even after making allowance for the difference in market price as affected by different freight rates. It is *only* when the dis-

> criminatory rate is paid intentionally for the purpose of stifling existent competition or preventing a new competitor entering the same commercial field, that the act of paying the higher price is denounced as a crime."

The distinction made in these cases and pointed out as a justification for upholding the validity of the statute is a vital one.

The Clayton Act, 38 U. S. Stat. at Large, Ch. 323, p. 730, "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," makes the payment of a higher price in one locality than in another unlawful only when the effect thereof is to substantially lessen competition or tend to create a monopoly. Its provisions allow a different price to be paid on account of differences in grade, quality, or quantity of the article sold, and a different price may be paid in different communities when done in good faith and to meet competition. The federal act does not attempt to make the payment of different prices in different communities illegal by legislative fiat, nor to interfere with economic laws, but the very purpose of the law is to preserve and foster competition rather than to destroy it.

Where statutes have been passed similar in their operation to the statute here under consideration, interfering with the right of contract, *without regard* to the purpose or intent with which such contracts are entered into, and when such contracts are *not* made and entered into for the purpose of injuring others or of creating a monopoly, they have been declared unconstitutional.

The case of *McFarland* v. *American Sugar Refining Company*, 241 U. S. 78, 60 L. Ed. 899, bears directly upon the issue here. That case involved a statute which *pro-*

hibited the sale of sugar at a lower price in one locality than in another for the purpose of creating a monopoly or injuring competition. The statute provided that:

> "any person engaged in the business of refining sugar within this state who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be *prima facie presumed* to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine."

The evidence in the case showed that the company was paying a less price in Louisiana than it was paying elsewhere, and it was the contention of the prosecution that the *mere variation in price* made a *prima facie* case under the statute. It was held, however, that the *mere payment of a different price in one locality than in another was not in itself unlawful and did not in itself even indicate* that the party paying such prices was intending an injury or a wrong to any person. The court, referring to the provision of the statute just above mentioned, says:

> "As to presumption, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be a *rational connection between the fact proved and the ultimate fact presumed*, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, J. & K. C. A. Co.* v. *Turnipseed*, 219 U. S. 35, 43, 55 L. Ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 S. Ct. Rep. 136, Ann. Cas. 1912-A 463, 2 N. C. C. A. 243. *The presumption created here has no relation in experience to general facts.* It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

And the court in the syllabus states it to be the rule that:

> "A state can not, consistently with the equal protection of the laws clause of the United States Constitution (14th Amendment), create * * * a presumption of participation in a forbidden monopoly or combination from the systematic payment in Louisiana by a person engaged in sugar refining within that state of a less price for sugar than he pays in any other state, nor a presumption that the closing or keeping idle of a sugar refinery for more than one year was for the purpose of violating that statute or the laws against monopolies."

In the case of *Niagara Fire Insurance Company* v. *Cornell*, 110 Fed. 816, the federal court declared a Nebraska statute unconstitutional. This statute was the *anti-trust* statute of 1897. In that statute the legislature had defined many acts to be unlawful, among which were *to fix any standard whereby the price to the public shall in any manner be established;* to enter *into any contract by which a party is not to deal in any article below a certain price, or by which the parties agree to keep the price at any given sum.* The court, in referring to this statute in its operation covering insurance contracts, said:

> "But if legislation like this can be sustained, then matters which have been the subject of contract from time immemorial can not longer be covered by agreements. It can not be said of this statute that any one material provision may be held void, and allow the balance of the statute to stand and be enforced. * * * If this statute is valid, two men in the same line of business in the same town or village can not form a partnership if it tends to maintain prices. They must continue, each for himself, until one or the other or both are destroyed. Neither can a stock company nor a corporation be formed by two or more if, by so doing, the prices are maintained. This statute is not a step, but it is a long stride—hundreds

> of years—backward, when monarchs, cabinet officers, and even parliament decreed the price to be paid for a day's labor, and the cost of all the necessaries of life, even to the loaf of bread. * * * If this law is valid, two or more farmers can not agree that they will not sell their wheat to a neighboring mill for less than so much per bushel. Two or more farmers can not agree that the livestock feeder shall not have their corn, only at a certain price. Blacksmiths can not agree that they will charge so much for shoeing horses. Nothing can be agreed to by the manufacturer, the farmer, the gardener, the contractor, consumer, or laborer to prevent the reduction of price. Can it be possible that such legislation is valid?"

The Minnesota statute in the case here under consideration by its terms aims at no particular wrong. There is no avowed purpose for its enactment. Though the former law was directed at monopolies and unfair competition, this law has stricken from it that provision; and what was the real purpose of the enactment must be left to conjecture. Any idea in the mind of the legislature that such a law was justified as an exercise of the police power, especially where the purpose in the passage of the law is not disclosed, is of no aid or persuasive force.

In order to be justified under the police power the legislation must bear some reasonable and rational relation to an evil or wrong sought to be remedied, and must be justified by public necessities as a reasonable and proper means for the preservation of the public health, safety, morals, or general welfare.

In *Mugler* v. *Kansas*, 123 U. S. 623, the court in reference to the police power said:

> "Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police

powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute. Sinking Fund Cases, 99 U. S. 718 (25:501), the courts must obey the Constitution rather than the law-making department of the government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury* v. *Madison*, 5 U. S. 1 Cranch. 137, 167 (2:60, 70), 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. * * *

"Undoubtedly the state, when providing, by legislation, for the protection of the public health, the

public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government."

In *Lochner* v. *New York*, 198 U. S. 45, 57, 25 Sup. Ct. 539, 543, 49 L. Ed. 937, 3 Ann. Cas. 1133, the court said:

"The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held valid which interferes with the general right of an individual to be free in relation to his own labor."

In 12 Corpus Juris, p. 929, Section 441, it is said:

"In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare, that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised. The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power. The legislature may not, under the guise of the police power, impose on property burdens so excessive as to work a confiscation thereof. Nor may such power be used in any other way as a cloak for the invasion of personal rights or private property, neither may it be exercised for private purposes, nor for the exclusive benefit of particular individuals or classes."

And in the case of *Lawton* v. *Steele*, 152 U. S. 133, the rule is stated that:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its public power is not final or conclusive but is subject to the supervision of the courts."

In the case of *Adkins* v. *Children's Hospital*, 261 U. S. 526, 67 L. Ed. 785, the Supreme Court of the United States held that an act of Congress, attempting to fix the minimum wage for women, was an unreasonable and arbitrary interference with the liberty of contract guaranteed by the Constitution. The court quotes from the case of *Coppage* v. *United States*, 236 U. S. 1, as follows:

> "Included in the right of personal liberty is the right of private property, and partaking of the nature of each is the right to make contracts for the acquisition of property."

And then the court adds:

> "There is, of course, no such thing as an absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is nevertheless the *general rule* and *restraint the exception;* and the exercise of legislative authority to abridge it can be *justified only by the existence of exceptional circumstances.*"

In the case of *Commonwealth* v. *Boston Transcript Company*, 144 N. E. 400 (Mass.), a statute was involved which required any newspaper to publish notices given out by the minimum wage commission covering the fact as to whether certain employers had complied with the recommendations of the commission with regard to wages

and providing that the newspapers should accept and print these notices at a specified rate. The court held that the statute was an unreasonable infringment upon the liberty of contract, and in declaring that a newspaper could not be compelled to print such notices in the manner stated, the court said:

> "He may not want to print the designated matter at the rates commonly charged for space. It may not be for his business advantage so to print it. He may not want to print it at any price. His preferences, desires, or financial advantage or detriment are entitled to no consideration under the statute. This class of advertising may be peculiarly onerous. It may be especially disagreeable from a business standpoint. Its fair market value, regarded as space occupied, may be much greater than the price commonly charged for business advertisements of the usual character. Conditions can readily be conceived where these factors would exist. No one of them or others of kindred nature can be weighed under the terms of the statute."

In the case of *Cottrel* v. *Union Pacific Ry. Co.*, 2 Idaho 578, 21 Pac. 416, the court held unconstitutional a statute which declared a railroad company liable for injury to livestock, even without proof of any negligence on the part of the railroad company. The court said:

> "An examination of the section will show that no default or negligence of any kind need be established against the railroad company. A penalty—for it is in the nature of a penalty—should not be inflicted upon the defendant by the legislature for doing a lawful act in a lawful manner. In fact it has no power to inflict such penalty. The running of trains by this corporation was lawful, and of great public benefit, and has served more to develop the resources of this western country than any other agency. It is not claimed that the liability attaches for the vio-

lation of any law, the omission of any duty, or the want of proper care and skill in running their trains. It is contended that the statute should be construed so that it may establish a rule of prima facie evidence of negligence. Such construction of the statute does not seem to us a fair one. The language is plain, and it was clearly the intention of the legislature to make the killing of the animal by the railroad company the only test of its liability. To do this, in our opinion, would be an act of great injustice, and would be a clear violation of the constitution."

In the case of *Ex parte Smith*, 193 Cal. 337, 223 Pac. 971, the court held unconstitutional an act of the legislature limiting the fees to be charged by private employment agencies. In the course of the opinion the court said:

"The act is assailed by petitioner on the ground that it is in contravention of the Constitution of the United States, and particularly the due process clause of the Fourteenth Amendment thereto; also that it contravenes the provisions of Sections 1 and 13 of Article 1 of the Constitution of this state.

"These objections find support in our decisions and also in the decisions of the United States Supreme Court. The constitutional question raised is not a new one. The legislature of 1903 adopted a statute which placed a limitation on the amount of fees that an employment agency may charge which, in legal effect, was identical with the limitation fixed by the act before us, and this court, in disposing of the question, said:

"'The petitioner is engaged in a harmless and beneficial business. As part of his 'property' in that business are the services that he renders in obtaining employment for those seeking it. It is not compulsory upon any one to employ him, and who seeks

> to avail himself of his services is at liberty to reject them if the terms of the contract for compensation are not satisfactory to him. This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations. Such legislation is of the class discussed by Judge Cooley in the paragraph above quoted, 'entirely arbitrary in its character, and restricting the rights, privileges, or legal capacities' of one class of citizens 'in a manner before unknown to the law.' For such legislation, as he very justly adds, those who claim its validity should be able to show a specific authority therefor, 'instead of calling upon others to show how and where the authority is negatived.' *Ex parte Dickey*, 144 Cal. 238, 77 Pac. 925, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428."

In *MacMillan Co.* v. *Johnson*, 269 Fed. 28, the court held a section of the statute unconstitutional which read:

> "It shall be unlawful for any retail dealer in text books to sell any books listed with the superintendent of public instruction as hereinbefore provided at a price to exceed fifteen per cent advance on the net wholesale price as so listed, and the cost of transportation."

The court said, at page 32:

> "This section must be construed according to its plain terms, and, as construed, is an unwarranted interference with freedom of contract and with the right to engage in the business of book selling at

> retail and as the extent of the sales of plaintiff to retail dealers depends on the right of the latter to resell, the effect of such section would be to deprive the plaintiff of its property without due process of law. Section 7 is therefore unconstitutional and void."

The legislature had no power to arbitrarily fix rates on the commodities specified in this statute. The business of buying milk, cream, and butterfat is *not a business impressed with a public interest.* Where property is devoted to a public use, the owner of the property in effect grants to the public an interest in the use; and from that time forward while the property is so used it may be controlled by the public for the common good and its rates and charges regulated. But there is no attempt in this statute to declare that the business brought within the purview of the statute is a public business or is to be treated as such.

In the case of *Wolff Packing Company* v. *Court of Industrial Relations,* 262 U. S. 552, 67 L. Ed. 1103, where a statute was enacted for the purpose of *regulating the fixing of wages by an industrial court in certain industries,* and an attempt was made to fix the scale of wages for the Wolff Packing Company, a company engaged in the packing house business, the court held that such a business was not impressed with a public interest, and that the law which attempted to fix the wages of employees in such business was an unwarranted and unreasonable infringement upon the right of contract. In that case the court said:

> "The mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of

its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

"It is urged upon us that the declaration of the legislature that the business of food preparation is affected with a public interest and devoted to a public use should be most persuasive with the court, and that nothing but the clearest reason to the contrary will prevail with the court to hold otherwise. * * *

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. * * *

"An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes (cases cited); and while this feature does not necessarily exclude businesses from the class clothed with a public interest it usually distinguishes private from *quasi* public occupations. * * *

> "If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public-interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. *Civil Rights Cases*, 109 U. S. 3, 24, 27 L. Ed. 835, 843, 3 Sup. Ct. Rep. 18. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the 14th Amendment."

The statute hereunder consideration does not aim to regulate the price paid for milk, cream, and butterfat, so that such price should not exceed what is reasonable and proper under the circumstances. The statute, in fact, does not go into the matter of the reasonableness of the price paid in any locality. The statute does not take into account the fact that the price will be influenced by local conditions as well as by the quality of the article purchased. In some localities the quality of the cream is better than in others. The condition and flavor of the cream may enter into price. The percentage of butterfat content in the cream has its effect on value, for it has a relation to transportation cost. And yet the statute declares that the payment of one price for butterfat at one place and the payment of a higher price for butterfat at another place shall constitute an unlawful act and be punishable as a public offense.

The statute arbitrarily and oppressively restricts and destroys the freedom of markets. The inevitable consequence is the elimination of purchasers and monopoly. The constitution of the state of Minnesota makes it un

lawful to interfere with or restrict the freedom of markets for food products (Art. IV, Sec. 35), and the Supreme Court of Minnesota, in the case of *State* v. *Standard Oil Co.*, 111 Minn. 85, 126 N. W. 527, has said that "Preserving freedom of markets is as important as the prevention of fraud." We cannot see how the statute hereunder consideration can consistently with these policies and rules of law be held to be constitutional.

Certainly there can be no question but that this statute is an arbitrary and unreasonable interference and infringement upon the right of contract, and takes from the companies engaged in the business of purchasing the commodities covered by the statute their rights and properties without due process of law, in violation of the Constitution of the United States.

II.

The statute creates an unreasonable burden upon interstate commerce in violation of article 1, section 8, clause 3 of the Constitution of the United States, and in violation of the laws of congress covering interstate commerce.

Shafer v. *Farmers Grain Co.*, 69 L. Ed. (U. S.) 554.

Lemke v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458.

12 Corpus Jurisprudence 26.

As has been pointed out, the complaint filed in this prosecution declares that the butterfat "was purchased for shipment and was shipped to Sioux City, Iowa, for manufacture and sale thereat." In fact, as the record discloses, the Fairmont Creamery Company, in the entire southern half of Minnesota, purchases butterfat for shipment to Sioux City. That is the place of manufacture

of the butterfat into butter. All of the purchases of the Fairmont Creamery Company in this district are part of interstate commerce.

As has also been pointed out, this law in its operation applies almost entirely to centralized creameries, the large creameries which purchase in the state and ship long distances. A great portion of the butterfat purchased in the state being purchased for shipment and shipped to points outside of the state, all constituting interstate commerce.

The 660 farmers co-operative creamery companies, each one of them doing business at its particular town and locality, do no shipping and have no transportation costs. They purchase at one place only. They are not affected by this law. The law does not touch them. In practical effect the law *operates only upon cream bought for shipment,* since companies purchasing at more than one place must ship in order to collect their cream. Others do not ship. The law simply attempts to establish for those who do not ship, local monopolies.

It is apparent that the law in its operation hits the centralized creameries who transport, and that in its operation it directly affects the purchase of that great and substantial portion of the cream purchased by centralized creameries which is cream purchased as a part of interstate commerce. The large companies purchasing cream in Minnesota and shipping to their manufacturing plants *outside of Minnesota*, sell the manufactured butter in many states in the United States where local needs greatly exceed the production. The matter, therefore, of the purchase of butterfat in the state of Minnesota is not a matter of purely local concern, but is of concern to people in the several states where the butter manufac-

tured by the centralized creameries from cream from Minnesota is purchased.

It is the established rule that commerce includes the *purchase* of goods when the purchase is made with the direct object of shipping the goods to a place outside of the state where purchased.

> "Commerce includes the purchase, sale and exchange of commodities transported interstate."
> 12 Corpus Juris 26.

In the case of *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, 66 L. Ed. 458, the Supreme Court of the United States held, in accordance with former decisions, that the purchase of grain in North Dakota, a substantial portion of which was intended for shipment to and sale at terminal markets in other states, conformably to the usual and general course of business in the grain trade, *is interstate commerce*, which a state may not regulate by a statute which has the effect of controlling and burdening such commerce.

The case of *Shafer* v. *Farmers Grain Company*, 69 L. Ed. (U. S.) 554, seems to us a case directly analogous to the situation here. That case followed the reasoning in the decision just above cited, *Lemke* v. *Farmers' Grain Company*. It involved the Grain Grading Act of the state of North Dakota. That act provides regulations for the purchase and grading of grain in North Dakota. The act prevents buying by grade unless the buyer secures from the state a grading license for himself or his agent, and provides that no person shall buy any wheat by grading excepting where one producer buys from another producer, unless it has been inspected and graded by a licensed inspector. Other regulations are provided, but

these illustrate the nature of the provisions of the act. The court, referring to the purchase of grain for shipment to points outside of the state of North Dakota, said:

> "*Buying* for shipment, and shipping to markets in other states, * * * constitutes interstate commerce,—*the buying being as much a part of it as the shipping.*"

The court held that since the act directly regulated the *buying* of grain, and a substantial part of the buying of grain in North Dakota was part of interstate commerce, that the act was a direct burden and not an incidental interference with interstate commerce, and was therefore unconstitutional under the commerce clause of the United States Constitution. The court said:

> "The decisions of this court respecting the validity of state laws challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here,—one, that a state statute enacted for admissible state purposes, and which affects interstate commerce only incidentally and remotely, is not a prohibited state regulation in the sense of that clause; and the other, that a state statute which, by its necessary operation, directly interferes with or burdens such commerce, is a prohibited regulation and invalid, regardless of the purpose with which it was enacted."

The court distinguished the case of *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77, wherein a state statute regulating the storage charge for grain, held in the state elevators, was upheld as not being a direct burden upon interstate commerce, and said in reference to that case: "No restriction *on buying* or shipping was involved." And in referring to the case of *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 45 L. Ed. 619, the court refers to the distinction that the statute there "puts no obstacle in the

way of *the purchase* by the defendant company of grain in the state."

In the Grain Grading Act of North Dakota, under consideration in the case of *Shafer* v. *Farmers Grain Co.*, the court pointed out that a burden was directly placed upon the *buying* of grain for shipment. The court said:

> "Wheat * * * is a legitimate article of commerce and the subject of dealings that are nation-wide. *The right to buy it for shipment, and to ship it, in interstate commerce,* is not a privilege derived from state laws, and which they may fetter with conditions, but *is a common right, the regulation of which is committed to congress* and denied to the states by the commerce clause of the Constitution."

The court, in referring to the importance of the purchase of wheat for shipment in interstate commerce, says that the wheat purchased in North Dakota—

> "finds a market and is made available for consumption in other states, where the local needs greatly exceed the production. Obviously, therefore, the control of this buying is of concern to the people of other states as well as to those of North Dakota."

As a summary of its decision, the court says:

> "We think it plain that, in subjecting *the buying* for interstate shipment to the conditions and measure of control just shown, the act *directly* interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause."

That case applies the rules to a situation parallel to the situation here. The analogy is complete. Unquestionably

the effect of the Minnesota statute here under consideration is to burden, interfere with, and in fact prevent the *buying* of cream for interstate shipment, giving the great and direct advantage to local purchasers of cream who do not ship. The act constitutes a direct burden upon interstate commerce. It oppressively restricts the right of contract in the business of carrying on interstate commerce in the commodities specified in the statute.

CONCLUSION

For the reasons given, we respectfully submit that the statute complained of is unconstitutional and that the case should be reversed and dismissed.

FAIRMONT CREAMERY COMPANY,
E. J. HAINER,
LEONARD A. FLANSBURG,
GEO. A. LEE,
M. S. HARTMAN,
Its Attorneys.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 725.

FAIRMONT CREAMERY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF OF DEFENDANT IN ERROR.

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INDEX.

CASES CITED.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error was duly charged with the violation of chapter 120, Laws of Minnesota for 1923 (General Statutes 1923, § 3907), reading as follows:

> "Any person, firm, co-partnership or corporation engaged in the business of buying milk, cream or butterfat for manufacture or for sale of such milk, cream or butterfat, who shall discriminate between different sections, localities, communities or cities of this state, by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by said person, firm, co-partnership or

corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture or locality of sale of such milk, cream or butterfat, shall be deemed guilty of unfair discrimination, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail for not exceeding 90 days."

When the case came on for trial, the district judge, on request of plaintiff in error, without trial, certified to the Minnesota supreme court the following questions, among others:

1. Whether the statute violates the equality clause of the Federal constitution.

2. Whether it violates the liberty of contract provision of the Federal constitution.

3. Whether it contravenes the commerce clause of the Federal constitution.

These questions were each answered in the negative by a decision reported in 162 Minn. 146.

The case then proceeded to trial in the district court, and plaintiff in error was found guilty. A motion for new trial was made and denied, and an appeal to the supreme court taken from the order denying such motion. The above-mentioned constitutional questions were again duly raised, argued, and decided, the decision being reported in 210 N. W. 163.

The validity of the statute being again sustained, the case was remanded for final judgment and such judgment

duly entered. An appeal was taken therefrom to the supreme court, where it was affirmed, the decision appearing in 210 N. W. 608.

The case is brought to this court on a writ of error duly issued.

STATEMENT OF FACTS.

The undisputed facts are: The plaintiff in error is a corporation engaged in the buying of butterfat in the form of cream at many points in southern Minnesota, including Bingham Lake, Mountain Lake, and Madelia, distinct communities (R. 7); that cream so purchased was shipped to Sioux City, Iowa, for manufacturing purposes (R. 7); that the above named villages are on the same railroad line running directly to Sioux City (R. 14); that Bingham Lake is closest to Sioux City, and ten miles east of it is Mountain Lake, and thirty-four miles farther east is Madelia (R. 15); that on June 11, 1923, plaintiff in error purchased butterfat in the form of cream at each of the named points, paying 35 cents per pound therefor at Bingham Lake and Mountain Lake (R. 13), and 38 cents per pound at Madelia (R. 11); that the difference in price was *not due* to difference in the cost of transportation, the cost thereof being higher on shipments from Madelia (R. 7, 8).

On the trial, plaintiff in error offered to prove certain issuable facts set out in its brief, but the court, being of the opinion that such facts, if proven, would not constitute a defense to the charge, declined to receive the evidence. Plaintiff in error assumes in its brief that such offered proof must be accepted as established facts in the case. We respectfully submit that no such conclusion follows.

ARGUMENT.

Plaintiff in error charges that the statute is an unwarranted and oppressive interference with liberty of contract, denies the equal protection of the law, and is for these reasons in violation of the fourteenth amendment to the constitution of the United States, and is also in violation of the interstate commerce clause.

Does the Statute Violate the Equality Provision of the Federal Constitution?

This assignment is not stressed in the brief of plaintiff in error, and hence will be but briefly considered herein.

The equal protection clause does not require that every evil shall be corrected in a single legislative enactment. It is sufficient if the law-making body discerns a special evil and directs legislation against it.

Miller v. Wilson, 236 U. S. 373, 384.

Central Lumber Co. v. South Dakota, 226 U. S. 157, 159, 161.

Middleton v. Texas etc. Co., 249 U. S. 152, 157.

It may select a particular industry or business and deal with the evils existing therein.

State v. Bridgeman & Russell Co., 117 Minn. 186.

State v. Standard Oil Co., 111 Minn. 85.

State v. Drayton, 82 Neb. 254.

The selection of those engaged in the business of buying milk, cream or butterfat for manufacture or for sale, and directing the legislation toward evils existing in such busi-

ness, clearly comes within the principle of the above cases and does not violate the equal protection clause.

Does the Statute Violate the Liberty of Contract Provision of the Federal Constitution?

Let us look to the brief of plaintiff in error to ascertain wherein it is claimed that the act is in violation of the above mentioned provision of the Federal constitution. It complains that the statute deprives it of the right to purchase at such prices as it may be willing to pay and the seller willing to accept; that it requires it to pay the same price at all points of purchase within the state, after making due allowance for the cost of transportation, thus denying the right to vary its prices to meet local competition, or to recognize other natural causes for a more favorable price in one locality than in another.

It is contended by plaintiff in error, and is conceded herein, that the statute does require it to pay the same price for the same commodity at all points of purchase within the state, after making due allowance for the difference, if any, in the cost of transportation, and that it does prevent complainant from meeting local competition by increasing its price only at such point, and from varying its price in response to natural conditions that may favor a higher price in one community over another, if any such conditions do in fact exist.

It is further conceded that the state may not arbitrarily and capriciously interfere with the right of an individual to contract at will in conducting a lawful business, and that to do so is to deprive him of liberty and property without due process of law, in violation of the federal con-

stitution. On the other hand, it is equally well established by judicial construction that the federal constitution does not guarantee to the individual absolute freedom of contract.

Miller v. Wilson, 236 U. S. 373.
Schmidinger v. Chicago, 226 U. S. 578.
Lochner v. New York, 198 U. S. 45.
Chicago etc. Co. v. McGuire, 219 U. S. 549.
Williams v. Evans, 139 Minn. 32.

As stated in Miller v. Wilson, supra, the "liberty of contract guaranteed by the constitution is freedom from arbitrary restraint, not immunity from reasonable regulation to safeguard public interests." Such right to contract, although in furtherance of a business lawful of itself, is subject to the exercise of the police power of the state. Indeed, the very essence of civilized government is that the individual must yield his personal liberties and privileges for the general benefit and good of the many.

Plaintiff in error apparently concedes that a state may prohibit payment of different prices in different localities when done for the purpose of destroying competition or creating a monopoly (brief, page 28). Statutes making it an offense to discriminate in prices between different localities when "intent" or "purpose" to create a monopoly or to destroy competition is made an ingredient thereof, have been uniformly sustained.

Central Lumber Co. v. South Dakota, 226 U. S. 157.
State v. Drayton, 82 Neb. 254.
State v. Bridgeman & Russell Co., 117 Minn. 186.
State v. Standard Oil Co., 111 Minn. 85.

State v. Fairmont Creamery Co., 153 Ia. 702.
State v. Rocky Mountain Elevator Co., 52 Mont. 487.

Such a statute was enacted in Minnesota in 1909 (chapter 468, Laws 1909), and remained in force until the enactment of chapter 120, Laws 1923, here involved. The validity thereof was sustained in State v. Bridgeman & Russell Co., supra. Such statute prohibited discrimination in prices between localities when done "with the intent of creating a monopoly or destroying the business of a competitor." Such was the law of Minnesota for thirteen years. In sustaining the same, the court must have found, and did find, that there existed evils justifying the state in thus exercising its police powers.

In 1923 the legislature amended the law by striking therefrom the ingredient of intent or motive, thus making it an offense to discriminate in prices between localities, except as affected by the cost of transportation, whether done for the purpose of creating a monopoly or destroying competition or not (chapter 120). It was designed to meet and correct the same evils as the old statute. It must be assumed that in the judgment of the legislature the remedy prescribed by the old law was ineffectual to accomplish the desired results. It had been tried. Motive or intent were essential ingredients of the offense prescribed therein. The legislature found from years of actual experience that the difficulty of proving such elements rendered the act impotent, and that a more drastic and direct remedy was necessary.

What were the conditions confronting the legislature? During the past few years there have developed in the dairy industry of the state large and financially powerful

companies with one or more central manufacturing plants and many purchasing stations. These are known as "centralizers". They maintain purchasing stations at points where they meet the competition of cooperative and independent creameries and at other points where no competition exists. The cooperative and independent companies, as a general rule, purchase cream at only one place. In 1923, according to the creamery statistics for that year compiled by the state dairy and food department, there were 628 cooperative creameries, 48 centralized creameries, and 127 independent or individual creameries in Minnesota. These centralized creameries, controlling ample capital, with large central plants and many local purchasing stations, possess special facilities for destroying competition and creating monopolies not possessed by cooperative or independent creameries. Such fact was judicially recognized in the Bridgeman & Russell Company case. The facilities of centralized creameries for maintaining artificial and unwarranted prices and of destroying local competition at a particular point are non-comparable to those of the local competitor. Not only will its large capital enable it to wage a price war, but its special facilities for recouping its losses enables it to continue such fight until the local competitor is made subservient or is crushed. A local company must buy at such prices as will enable it to manufacture and market its product without loss, or it must suffer a diminution of its capital. It has no means of passing its losses on to its patrons. On the other hand, losses sustained by a centralizer in a price war at a particular purchasing station may be fully and completely recouped at other stations where no competition exists and where, in the exercise of its so-called "free-

dom of contract", it may establish prices to suit its own ends.

Its many stations being but units of a great organization, it is immaterial to the company that it may lose money at a particular station by buying there at artificial and unwarranted prices so long as it may recoup such loss at its other stations. When a threatened competitor at a particular place has been made subservient, the scene of battle may shift to a new station with like results. By carrying on such a systematic price war, a centralized company may destroy all competition within the territory of its operations. The possession of this great power and advantage and the existence of temptation to use it is expressly recognized by our supreme court. (State v. Fairmont Creamery Co., 162 Minn. 146).

What is the practical effect of the statute in question? It does not undertake to fix the price to be paid. Plaintiff in error may pay a high price or it may pay a low price. It may overbid or underbid its competitors. If its great capital, its efficient organization, or its large volume of business enables it to purchase cream, to resell or to manufacture it into butter or cheese, and to market its product successfully on a narrower margin of profit than the cooperatives or independents, it is not deprived of this natural advantage. It may legally use the same to increase its business by uniformly paying a higher price at its various stations than its less fortunate competitors can afford to pay. Cream purchased by it in southern Minnesota is shipped to Sioux City. A pound of butterfat at that point has the same value whether purchased at Bingham Lake, Mountain Lake, Madelia, or any one of its many

stations in southern Minnesota. Such being the case, the state does say to plaintiff in error, and to others similarly situated, you must pay a uniform price, making due allowance for the difference in the cost of transportation, to the end that you will be on a partial parity with local purchasers if you undertake to create a monopoly by paying unwarranted or fictitious prices. The local creameries, buying at one place only, cannot recoup the losses of a price war by underpaying elsewhere, and we will not permit you to do so. It is their privilege and it is your privilege to wage such a war at a loss of capital, but they cannot and you may not do so at the expense of patrons at other points. It is manifestly unfair and unjust that those who patronize stations at non-competitive points should bear the losses sustained at competitive stations resulting from the payment of unwarranted prices. Freedom of markets means markets wherein the price is determined by natural economic laws. Those selling to centralized creameries at stations where no competition exists are entitled to such a market.

The state, having found the old law ineffective to prevent the evil because of the almost impossibility of proving by competent evidence that price discrimination between localities was for the purpose of creating a monopoly, determined in its legislative judgment to prohibit discrimination between localities without regard to intent or motive. Did it transgress the federal constitution in so doing? This is the crucial question in this case.

It is the contention of defendant in error that a particular transaction, though lawful in and of itself, and although there inheres in it no purpose of creating a monopoly or destroying a competitor, may be prohibited

if it is reasonably necessary so to do to suppress a substantial evil within the police power of a state to correct. This power finds support in many cases.

Booth v. Illinois, 184 U. S. 425.

Otis v. Parker, 187 U. S. 606.

Purity Extract Co. v. Lynch, 226 U. S. 192.

Geer v. Connecticut, 161 U. S. 519.

New York v. Hesterberg, 211 U. S. 31.

State v. Shattuck, 96 Minn. 45.

Merrick, et al, v. Halsey Co., 242 U. S. 568.

Rast v. Van Deman & Lewis Co., 240 U. S. 342.

Frisbie v. United States, 157 U. S. 160.

Thus, in Purity Extract Co. v. Lynch, supra, this court said:

> "It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. * * * With the wisdom of the exercise of the judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of the legislative power has been transcended."

Again, in sustaining a statute forbidding options to sell or buy grain or other property at a future time, though actual delivery was intended and the contract was not a gambling transaction, this court said in Booth v. Illinois, supra:

> "The argument then is that the statute directly forbids a citizen from pursuing a calling which in itself

involves no element of immorality, and therefore by such prohibition invades his liberty as guaranteed by the supreme law of the land. Does this conclusively follow from the premises stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing such calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless the calling be actually prohibited, the courts cannot interfere, unless looking through mere forms and at the substance of the matter, they can see that the statute enacted professedly to protect the public morals has no real or substantial relation to that object."

In Otis v. Parker, supra, this court was considering the validity of a provision of the California constitution forbidding the sale of shares of stock on margin, and we quote therefrom as follows:

"Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it has shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot in-

terfere unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.' Booth v. Illinois, 184 U. S. 425, 429."

If the legislature may prohibit businesses and callings not in and of themselves dangerous or detrimental to the welfare of the people when necessary so to do to suppress an evil, we respectfully submit that it is within the constitutional power of a state to prohibit a practice within a lawful business, though such practice is susceptible of legitimate uses, when it is commonly resorted to as a means to a wrongful end.

The court will take judicial notice of the magnitude and importance of the dairy industry of the State of Minnesota.

Sligh v. Kirkwood, 237 U. S. 52.

That the prosperity of the state is dependent in a substantial and vital measure upon this great industry cannot be seriously questioned. According to statistics prepared by the state dairy and food department for the year 1923, there were 151,141 local creamery patrons, maintaining dairy herds of 1,235,295 cows and producing dairy products (fertilizer and calves included) of the aggregate value of $229,620,116. The success and future expansion of the dairy industry depends largely upon the maintenance of proper markets for its products. Anything injuriously affecting or destroying the freedom of its markets is injurious to the industry itself and to the general welfare and prosperity of the state. Purchasing monopolies destroy freedom of markets. The constitution of Minnesota makes unlawful combinations to monopolize the

markets for food products or to interfere with or restrict their freedom. Article IV § 35.

> "Preserving freedom of markets is as important as the prevention of fraud."
>
> State v. Standard Oil Co., 111 Minn. 85, 96.

It must be assumed that the legislature was familiar with these facts and economic principles. It found that monopolies were being created and competition stifled by price wars; that large and powerful companies were waging the same at the expense of the public by passing the cost thereof on to patrons having no competitive market; that the right to pay different prices at different points was essential to the means employed. It found the source of unfair competition and resultant monopolies in price discrimination between localities. The state tried for years a statute requiring as an element of the offense a purpose to create a monopoly or to injure a competitor, but without success. The legislature then enacted chapter 120, here involved, which, dictated by experience and the necessities of the case, prohibited a practice essential to the method used to destroy competition.

The fact that various courts, in sustaining the validity of statutes prohibiting discrimination in prices between localities when done with "intent" or for the "purpose" of creating monopolies, pointed out that discrimination was an offense only when made with such intent or for such purpose, does not amount to a holding that a state lacks power to prohibit discrimination without regard to motive or intent. Such question was not presented, and was not determined. Such cases are important only as they recognize the fact that such discrimination is a method used in effecting monopolies and destroying competition.

Whether there exists an evil inimical to the general welware or prosperity is primarily a legislative question. The police power is vested in the state, acting through the legislature, and not in the courts. It is the duty and function of the legislature to discern and correct evils.

Rast v. Van Deman & Lewis Co., 240 U. S. 342.

The legislature having exercised its judgment as to the existence of evils requiring the exercise of its police power, the courts may not reconsider that determination for the purpose of arriving at one of their own. To do so would be to deny to a co-ordinate branch of the government the right to discharge functions constitutionally secured to it.

This does not mean that the legislative judgment is conclusive upon the courts or that judicial opinion may be controlled by legislative opinion. But it does mean that the courts may go no further than to determine whether there exists any reasonable basis for such legislative judgment.

In State v. Krentzberg, 114 Wis. 530, the court said:

> "We must and do concede to the legislative branch of the government the fullest exercise of discretion within the realm of reason, and, if a public purpose can be conceived which might rationally be deemed to justify the act, the court cannot further weigh the adequacy of the need or the wisdom of the method."

Again, in State v. Emery, 178 Wis. 147, the court declared the principle as follows:

> "If there is any reasonable basis upon which the legislation can constitutionally rest, the court must presume that the legislature had such fact in mind and passed the act in pursuance thereto. All necessary

> facts to sustain an act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the minds of the court."

Given a legitimate subject for the exercise of police power, it is for the legislature to adopt such measures as it may deem necessary to make its action effective so long as they have a reasonable relation to that end.

State v. Emery, 178 Wis. 147.

Purity Extract Co. v. Lynch, 226 U. S. 192.

New York ex rel. Silz v. Hasterberg, 211 U. S. 31.

Lommen v. Minneapolis Gas Co., 65 Minn. 196.

In Merrick v. Halsey Co., 242 U. S. 568, this court after referring to diverse views as to the advisability of the state, through the blue sky law, attempting to investigate the soundness, good faith and prospects of corporations, said:

> "Upon this difference in views we are not called upon to express an opinion, for, as we have said, the judgment is for the state to make, and in the belief of evils and the necessity for their remedy and the manner of their remedy the state has determined that the business of dealing in securities shall have administrative supervision."

The court further said:

> "It may be that there are better ways to meet the evils at which the statute is directed and counsel have felt it incumbent upon them to suggest a better way. We can only reply that it is not our function to decide between measures and upon a comparison of their utility and adequacy determine their legality."

In Purity Extract Co. v. Lynch, 226 U. S. 192, we find the following statement:

"With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system."

DOES THE STATUTE VIOLATE THE INTERSTATE COMMERCE CLAUSE?

It must be conceded that a state statute which, by its necessary operation and effect, directly regulates, interferes with or burdens interstate commerce is prohibited by the federal constitution.

Such was the character of the statutes involved in Lemke v. Farmers Grain Co., 258 U. S. 50, and Shafer v. Farmers Grain Co., 268 U. S. 189, cited and relied upon by plaintiff in error.

It is equally well established, however, that a state statute enacted for an admissible state purpose and which affects interstate commerce only indirectly and remotely is not prohibited by the interstate commerce provision of the federal constitution.

Sherlock v. Alling, 93 U. S. 99.

Kidd v. Pearson, 128 U. S. 1.

Slight v. Kirkwood, 237 U. S. 52.

Plumley v. Massachusetts, 155 U. S. 461.

Asbell v. Kansas, 209 U. S. 251.

New York ex rel. Silz v. Hesterberg, 211 U. S. 31.

Oliver Iron Mining Co. v. Lord, 262 U. S. 172.

Shafer v. Farmers Grain Co., 268 U. S. 189.

In Sligh v. Kirkwood, supra, sustaining a statute of the State of Florida prohibiting the sale or shipment of citrus fruits which were immature or otherwise unfit for consumption, as against a contention that it absolutely prevented the purchase of such fruit for shipment beyond the state, thus interfering with interstate commerce, this court said:

> "It is immaterial that the regulation incidentally affects interstate commerce when the object of such regulation is not to that end, but is a legitimate attempt to protect the people of the state."

Again in Sherlock v. Alling, supra, this court said:

> "In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution. * * *
>
> And it may be said generally that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction."

We respectfully submit that the statute here involved does not directly interfere with or burden interstate commerce, nor does it attempt to regulate such commerce, but is purely a police regulation enacted in the interest of the people of the state and only remotely and indirectly affects interstate commerce.

Plaintiff in error may purchase butterfat when and where it chooses, upon whatever basis it may elect, do with it as it pleases, ship without restriction or interference, and pay therefor any price that it is willing to give, except that the price it pays in one community it must pay in all communities.

Such statute is clearly distinguishable for the North Dakota statutes involved in the Lemke and Shafer cases. The North Dakota Trading and Inspection Act, considered in the first mentioned case, was a complete and comprehensive scheme to *regulate* the buying of grain. Purchases could be made only by those duly licensed by the state; licensees were accountable to the state; all grain purchased was subject to a system of grading, inspection and weighing fully prescribed by the act; and the margin of profit was within the control of the state inspector. The act applied to all grain bought within the state, substantially all of which was interstate commerce. It was a direct regulation of interstate commerce.

The North Dakota Grain Grading Act, involved in the Shafer case, was as direct a regulation and burden upon interstate commerce as was its predecessor, the North Dakota Trading and Inspection Act. It provided for a supervisor of grades, weights and measures, with full authority to make and enforce orders, rules and regulations to carry out the provisions of the act; it directed him to "investigate and supervise the marketing of same (wheat), with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage, fraud, and other unlawful practices." All purchases were subject to the established grades, weights and measures. Contrary to the long continued practice, dockage in wheat

had to be bought and paid for separately from the wheat, or separated and returned to the seller. A license was necessary to operate an elevator, for which a charge was made according to the capacity of the elevator. Every elevator operator "buying or shipping for profit" who did not pay cash in advance was required to give a bond. A buyer was required to keep a record of wheat bought and to show therein the price paid and the grades given, and "the price received and the grades received at the terminal market," which information was made available to the supervisor. Again we find an act directly regulating and burdening interstate commerce.

Respectfully submitted,

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Minnesota anti-discrimination law held invalid

SUPREME COURT OF THE UNITED STATES.

No. 725.—October Term, 1926.

Fairmont Creamery Company, Plaintiff in Error, *vs.* The State of Minnesota.	In Error to the Supreme Court of the State of Minnesota.

[April 11, 1927.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Supreme Court of Minnesota sustained the conviction of plaintiff in error, a corporation of that State charged with violating Section 1, Chapter 305, Laws 1921, as amended by Chapter 120, Laws 1923 (Minn. G. S. § 3907), which follows—

> Any person, firm, co-partnership or corporation engaged in the business of buying milk, cream or butterfat for manufacture or for sale of such milk, cream or butterfat, who shall discriminate between different sections, localities, communities or cities of this State, by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by said person, firm, co-partnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture or locality of sale of such milk, cream or butterfat, shall be deemed guilty of unfair discrimination, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail for not exceeding 90 days.

Chapter 468, Laws 1909, prohibited discrimination in prices between localities "with the intention of creating a monopoly or destroying the business of a competitor." The Act of 1921 forbade such discrimination with "the purpose of creating a monopoly, or to restrain trade, or to prevent or limit competition, or to destroy the business of a competitor." The Act of 1923, *supra*, eliminated purpose as an element of the offense.

The cause was begun in Cottonwood County by a complaint which alleged—

That the Fairmont Creamery Company on June 11, 1923, at the Village of Bingham Lake, Cottonwood County, committed the crime of unfair discrimination in the purchase of butter fat for manufacture and sale, in the manner following: Said company, while engaged in the business of buying milk, cream and butter fat for manufacture and sale and while maintaining regularly-established stations for purchases at Madelia, Mountain Lake, Bingham Lake and other villages for shipment to Sioux City, Iowa, there to be manufactured and sold, did wrongfully, unlawfully and unfairly discriminate between said localities by paying a higher price for butter fat at some stations than at others, after due allowance for transportation costs. And, more particularly, on June 11, 1923, the company purchased cream at Madelia for thirty-eight cents per pound, and on the same day purchased cream of like quality at Mountain Lake and Bingham Lake for thirty-five cents per pound, all being intended for transportation to Sioux City, Iowa, there to be manufactured and sold. On that day the cost of transportation from Madelia to Sioux City was higher than from the other places.

Bingham Lake, Mountain Lake (in Cottonwood County) and Madelia (in Watonwan) are villages of Southern Minnesota, about 120, 130 and 160 miles, respectively, northeast of Sioux City, and are connected therewith by a single direct railroad line.

At the trial the accused company offered testimony to show: "That during the last nine years, the price paid for butter fat in the southern half of Minnesota, at the different towns, has varied in each town; that the variation has been from one cent to eight cents; that such price is exclusive of transportation charges; that such variation is the normal condition of the market in the sale of cream and butter fat, and is the result entirely of competitive conditions; that in certain localities there are many more competitors than there are in others; that the quality of cream differs in different localities; that the equipment and efficiency of creameries in the various localities differ, and that each of these things enters into the price that is paid for the butter fat in the particular locality where the sale is made, and that this variation in price, in each town, in the southern half of Minnesota, existed on the eleventh

day of June, 1923, and that such variation is constant, and has existed for nine years previous to that time, and that these variations in price are due entirely to the economic conditions in each locality, and to competition."

The trial court excluded this evidence as immaterial, and the Supreme Court approved. We may, therefore, treat the facts stated as though established and held to have no bearing on the question of guilt or the validity of the enactment.

Defense was made on several grounds—That the venue was improperly laid in Cottonwood County; that the statute conflicted with the federal Constitution by denying equal protection of the laws and liberty to contract; and that it unduly interfered with interstate commerce.

The cause has been before the Supreme Court of Minnesota three times. 162 Minn. 146; 210 N. W. 163 (Aug. 27, 1926); 210 N. W. 608 (Oct. 27, 1926). Two opinions discuss the merits of the controversy; the last affirmed conviction upon the earlier ones.

Replying to the objection that venue was improperly laid in Cottonwood County, locality of the lower price, the Supreme Court said: "The gist of the offense is the discrimination between different localities by paying different prices in different localities after making due allowance for the cost of transportation from the point of purchase to the point of sale or manufacture. The statute chooses to define the offense by referring to a higher price at one point than at another. It might define it by referring to the payment of a lower price at one point than another. The meaning would be the same. . . . The offending fact is that there are sales at different prices and thereby discrimination."

It next held that the statute did not deny equal protection to those engaged in buying cream for manufacture or sale since they properly might be treated as a distinct class and subjected to peculiar regulations.

Concerning the claim that the statute undertakes to deprive plaintiff in error of property and liberty of contract without due process of law, contrary to the Fourteenth Amendment, the court said—

"There have developed in the State a large number of so-called centralized creameries which buy in different localities. We take

it that the defendant is one. In addition there are co-operative creameries and independent creameries not usually maintaining other buying stations, though some may. There is in the law nothing to prevent them doing so. We do not understand that the buying stations are commonly localized plants. [Counsel for the State say that creamery statistics for 1923 show then operating in the State six hundred and twenty-eight cooperative creameries, one hundred and twenty-seven independent or individual ones, and forty-eight 'centralizers.'] Often the buyer represents the creamery as an adjunct of his other business. Often his compensation is through a commission. He may have a place to receive the product or it may be delivered directly to the railroad station. A centralized creamery, supplied with ample capital and facilities, has the ability and meets the temptation to destroy competition at a buying station by overbidding, absorbing the resultant losses, if any, through the profits of its general business and, when competition is ended, to buy on a noncompetitive basis. If it does all this successfully, it has a monopoly, and may or may not treat producers justly. The statute seeks to prevent the destruction of competition by forbidding overbidding unless the dealer makes prices at other buying points correspond after proper allowances for the cost of transportation. If the statute is obeyed destroying competition is expensive. The statute limits the right of the creamery to contract at its buying points on a basis satisfactory to itself and its patrons. The State must concede this, and it does.

"The dairy industry, measured in money, is a large, perhaps just now the largest, productive industry of the State. . . . It is not surprising that in the marketing of so great a product, coming from so wide an area of production, under conditions such as obtain, those engaged in the industry claim abuses for which they seek legislative remedy. The exercise of the police power is not confined to measures having in view health or morals of the community. The welfare of a great industry and the people engaged in it may be guarded."

To the contention that the statute unduly burdens interstate commerce, the court replied: "A statute may indirectly or incidentally affect interstate commerce, as local police measures frequently do, without offending the commerce clause. . . . The defendant

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In this case I am inclined to the view that the statute is arbitrary and that the omission of the limitation that the sales should be made for a monopolistic purpose is needed to justify the legislation.

is a Minnesota corporation. The product which it purchased might have gone as well to a point in Minnesota for manufacture or resale. It so happened that it went to Iowa. The statute is not unconstitutional as an interference with interstate commerce."

Counsel for the State concede that the statute requires buyers to pay the same price for like commodities at all points of purchase, after proper allowances for transportation. Also, that it inhibits plaintiff in error from meeting local competition by increasing the price only at that place; also, from varying purchase prices to meet normal trade conditions.

They further admit that the State may not arbitrarily interfere with the right of one conducting a lawful business to contract at will; but they say that the federal Constitution does not guarantee absolute freedom of contract and the State may prohibit transactions not in themselves objectionable when within reason this may seem necessary in order to suppress substantial evil.

It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.

As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.

The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some

with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse.

In *Adams* v. *Tanner*, 244 U. S. 590, 594, this court said: "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Concerning a price-fixing statute, *Tyson and Brother* v. *Banton et al.*, — U. S. — (Feb. 28, 1927), recently declared: "It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with—*Commonwealth* v. *O'Brien & others*, 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon

the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught." And see *Adkins* v. *Children's Hospital*, 261 U. S. 525; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 537.

Booth v. *Illinois*, 184 U. S. 425, much relied upon by counsel for the State, sustained the validity of an Act forbidding options to sell or buy property at a future time, ultimate delivery being intended. The evident purpose was to prevent gambling contracts. The Supreme Court of Illinois pointed out that gambling was commonly incidental to dealings in futures, and held the Legislature might properly conclude that the public interest demanded their suppression as a class in order to avert this evil. This court said: "A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

The State also relies upon *Otis* v. *Parker*, 187 U. S. 606; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Rast* v. *Van Deman & Lewis*, 240 U. S. 342; and *Merrick* v. *Halsey & Co.*, 242 U. S. 568. But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with fredom of contract guaranteed by the Fourteenth Amendment, and to declare it invalid when without substantial relation to some evil within the power of the State to suppress and a clear infringement of private rights.

We need not consider other points advanced by plaintiff in error.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone dissent.